No. 84-510-CFX
Status: GRANTED

Title: Aspen Skiing Company, Petitioner
v.
Aspen Highlands Skiing Corporation

Docketed:
September 28, 1984

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Williams, Edward Bennett

Counsel for respondent: Trautman, Tucker K.

Entry	Date	Note	Proceedings and Orders
1	Sep 28 1984	G	Petition for writ of certiorari filed.
2	Oct 29 1984		Brief of respondent Aspen Highlands Skiing Corp. in opposition filed.
3	Oct 31 1984		DISTRIBUTED. November 21, 1984
4	Nov 2 1984	X	Reply brief of petitioner Aspen Skiing Co. filed.
6	Nov 26 1984		REDISTRIBUTED. November 30, 1984
7	Dec 3 1984		Petition GRANTED.
			**********
9	Jan 2 1985		Order extending time to file brief of petitioner on the merits until January 24, 1985.
10	Jan 24 1985		Joint appendix filed.
11	Jan 24 1985		Brief of petitioner Aspen Skiing Co. filed.
12	Jan 24 1985		Record filed.
13	Jan 24 1985	G	Motion of American Airlines, Inc. for leave to file a brief as amicus curiae filed.
14	Feb 5 1985		SET FOR ARGUMENT. Wednesday, March 27, 1985. (3rc case).
15	Feb 19 1985		Motion of American Airlines, Inc. for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.
16	Feb 28 1985		Brief of respondent Aspen Highlands Skiing Corp. filed.
17	Mar 4 1985		CIRCULATED.
18	Mar 20 1985	X	Reply brief of petitioner Aspen Skiing Co. filed.
19	Mar 27 1985		ARGUED.

84-510

No. ____

Office-Supreme Court, U.S.
FILED
SEP 28 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether under § 2 of the Sherman Act a firm with market power can be found to have a duty to cooperate with its smaller rivals in a court-ordered scheme of mandatory joint marketing?

2. Whether a firm can be found to have violated § 2 of the Sherman Act under the "essential facilities" or "bottleneck" doctrine not by denying a competitor access to an input necessary to its production process, but rather by refusing to combine with the competitor in the joint marketing of both firms' output to the public?

3. Whether a firm's refusal to participate in a joint marketing scheme demonstrates an unlawful intent to create or maintain a monopoly, in violation of § 2 of the Sherman Act?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. The Court Of Appeals' Decision Creates A New Duty To Cooperate By Marketing Jointly With One's Competitors	6
II. The Court Of Appeals' Decision Creates An Unwarranted Expansion Of The "Essential Facilities" Doctrine	9
III. The Court Of Appeals' Decision Aggravates The Existing Confusion As To The Proper Role Of Intent In Monopolization Cases	15
CONCLUSION	21
APPENDIX	
Opinion of Court of Appeals	1a
Judgment of Court of Appeals	40a
Stay Order of July 31, 1984	41a
Stay Order of August 28, 1984	42a

TABLE OF AUTHORITIES

CASES:	Page
Alexander v. *National Farmers Organization*, 687 F.2d 1173 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 2108 (1983)	7
Aspen Highland Skiing Corp. v. *Aspen Skiing Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,101 (10th Cir. 1984)	App. 1a
Ass'n for Intercollegiate Athletics for Women v. *NCAA*, 735 F.2d 577 (D.C. Cir. 1984)	20
Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983)	20
Becker v. *Egypt News Co.*, 548 F. Supp. 1091 (E.D. Mo. 1982), *aff'd*, 713 F.2d 363 (8th Cir. 1983)	18
Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1095 (1980)	9, 14, 20
Byars v. *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1980)	4, 5, 17
California Computer Products, Inc. v. *IBM*, 613 F.2d 727 (9th Cir. 1979)	9, 17
Cascade Cabinet Co. v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366 (9th Cir. 1983)	19
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927)	6
Fishman v. *Wirtz*, 1981-82 Trade Cas. (CCH) ¶ 64,378 (N.D. Ill. 1981)	10
Hecht v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)	10
Home Placement Service v. *Providence Journal Co.*, 682 F.2d 274 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 1279 (1983)	17
In re IBM Peripheral EDP Devices Antitrust Litigation, 481 F. Supp. 965 (N.D. Cal. 1979), *aff'd sub. nom. Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S.Ct. 370 (1983)	9
Lorain Journal Co. v. *United States*, 342 U.S. 143 (1951)	6
MCI Communications Corp. v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983)	9, 10, 13, 15, 20

Table of Authorities Continued

	Page
Mid-Texas Communications Systems v. *AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980)	17
National Collegiate Athletic Ass'n. v. *Board of Regents*, 104 S.Ct. 2948 (1984)	7
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973)	10
Paschall v. *Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984)	17
Schechter Poultry Corp. v. *United States*, 295 U.S. 495 (1935)	8
Standard Oil Co. v. *United States*, 221 U.S. 1 (1911)	16
Trace X Chemical, Inc. v. *Canadian Industries, Ltd.*, 1984-2 Trade Cas. (CEH) ¶ 66,089 (8th Cir. 1984)	17
United States v. *Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945)	18
United States v. *AT&T*, 1981-82 Trade Cas. (CCH) ¶ 64,277 (D.D.C. 1982)	10
United States v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975)	9
United States v. *Colgate & Co.*, 250 U.S. 300 (1919)	15
United States v. *Grinnell Corp.*, 384 U.S. 563 (1966)	16
United States v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912)	9, 11
STATUTES:	
Capper-Volstead Act, 7 U.S.C. § 291	7
Sherman Act § 1, 15 U.S.C. § 1	3
Sherman Act § 2, 15 U.S.C. § 2	*passim*
Clayton Act § 4, 15 U.S.C. § 15	2
MISCELLANEOUS:	
Adam Smith, *The Wealth of Nations*	7
3 P. Areeda & D. Turner, *Antitrust Law* (1978)	
¶ 626a	18
¶ 738m	9
J. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521 (1982)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ___

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Aspen Skiing Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals For The Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, thus far reported only at 1984-2 Trade Cas. (CCH) ¶ 66,101 (10th Cir. 1984), is reproduced at App. 1a.

JURISDICTION

The judgment of the Court of Appeals (App. at 40a) was entered July 13, 1984. By order of July 31, 1984 (App. at 41a), the Court of Appeals stayed its mandate until September 2, 1984. By order of August 28, 1984 (App. at 42a), that Court further stayed its mandate until October 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

United States Code, Title 15

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Aspen Highlands Skiing Corp. ("Highlands"), operating skiing facilities on one of the four mountains near Aspen, Colorado, brought this suit under § 4 of the Clayton Act against Aspen Skiing Corporation and its two wholly-owned subsidiaries, operating the facilities at the other three mountains. The defendant enterprise was later reorganized into a partnership, Aspen Skiing Company ("Ski Co."), which was then substituted as the defendant in the action and, for simplicity's sake, will be treated herein as having been the defendant at all relevant times. Highlands charged that Ski Co. violated § 1 and § 2 of the Sherman Act by monopolizing and conspiring to monopolize the sale of downhill skiing services in Aspen, Colorado.

The lawsuit focused on Highlands' contention that Ski Co. was obligated to cooperate with Highlands in jointly offering certain ski-lift tickets to the public. Both Highlands and Ski Co. had for years separately offered a wide variety of lift tickets—single-day, multiple-day and combinations of skiing and other services, such as instruction. Ski Co.'s tickets were generally interchangeable among its three mountains.

Beginning with the 1962-63 ski season, Highlands and Ski Co. had also offered a joint, multi-day ticket usable at either company's facilities, regardless of which one sold the ticket. Revenues from the joint ticket were divided through a series of devices for estimating the usage of each firm's facilities. In 1975 the Attorney General of Colorado had filed suit in federal court challenging the joint ticket as anticompetitive, in part because it tended to facilitate price fixing. The suit was settled by a consent decree, in which Highlands and Ski Co. agreed to limit their consultations and discussions if they again offered the joint ticket.

The companies did temporarily resume their joint offering. For the 1977-78 season, revenues from the joint ticket were split according to an agreed percentage. In the spring of 1978, Ski Co. offered Highlands a lower percentage, whereas Highlands demanded a measured-use basis of revenue-sharing. Ultimately the parties were unable to agree, and no joint ticket was offered thereafter. Highlands alleged that the negotiations failed because the revenue-sharing offer Ski Co. had made was one that it knew to be unacceptable.

This alleged refusal by Ski Co. to join with Highlands in offering a joint ticket was the basis of Highlands' claim of monopolization under § 2 of the Sherman Act. The jury rejected Highlands' conspiracy claim under § 1, but found for Highlands on its claim that Ski Co. had monopolized the submarket of skiing in Aspen. Highlands was awarded $2.5 million in damages, which was trebled to $7.5 million.

On appeal Ski Co. challenged, among other things, the sufficiency of the evidence to support a verdict of monopolization. The Court of Appeals for the Tenth Circuit, however, held that the case presented facts sufficient to support a monopolization claim under the essential facilities doctrine or as a refusal to deal motivated by an improper intent. The court let stand both the judgment for damages and an injunction requiring Ski Co. to join with Highlands in offering tickets usable at either company's facilities.

Ski Co. does not advance any business justification for its refusal to cooperate, other than a desire to compete rather than cooperate with a well-established business rival. Thus this case squarely presents the question whether a refusal to cooperate for that reason is lawful and socially desirable pro-competitive conduct or is monopolization in violation of § 2.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit observed that the question of when a firm with market power "has a duty to cooperate or deal is one of the most 'unsettled and vexatious' issues in antitrust law," App. at 16a-17a, citing *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 846 (6th Cir. 1979), but its decision only further confounds a number of important questions in the law of monopolization. Indeed, the

court's very statement of the problem suggests the profound flaws in its approach. The court perceived no distinction between the "refusal to deal" familiar to antitrust law and its own novel concept of a horizontal "refusal to cooperate."[1] From that seemingly innocuous starting point, however, the court of appeals derived a *duty of mandatory cooperation among competitors*, under which a firm with market power, if it declines to market its services jointly with its smaller rivals, violates the Sherman Act. The court did not explore the serious dangers this new duty presents to the policy of competition that is the foundation of antitrust law.

None of the authority relied upon can support such a remarkable result. The court of appeals has departed significantly from the decisions of other courts and put itself in conflict with them as to the application of the so-called "bottleneck" or "essential facilities" doctrine. It has also aggravated the growing confusion and conflict among the circuits in its exposition of the proper role of intent in cases alleging monopolization under § 2 of the Sherman Act. And it has lost sight of the fundamental policy of the Sherman Act—the promotion of competition among business rivals—in favor of its own view of circumstances in which cooperation among firms is the preferred policy. A writ should issue to enable this Court to define more clearly these important doctrines in the law of monopolization and to ensure that the interpretation of the Sherman Act is not turned on its head.

---

[1] *Byars* involved a classic "essential facilities" or "bottleneck" problem: in an industry with two vertically divided wholesale distribution markets, a firm with a regional monopoly in the first market denied product to a small firm seeking to compete with it in the second market.

I. The Court Of Appeals' Decision Creates A New Duty To Cooperate By Marketing Jointly With One's Competitors.

The court of appeals starts from the premise that this case concerns a refusal to deal *or to cooperate*. App. at 16a-17a. This reference to a "refusal to deal" gives the appearance of anchoring the court firmly in Sherman Act precedent, despite the unfamiliarity of the court's concept of a refusal to *cooperate*. It soon becomes clear, however, since there was no refusal to deal here in any sense heretofore recognized, that the court's newly fashioned *duty to cooperate* breaks fresh ground. By upholding a verdict of monopolization based on a firm's refusal to continue jointly marketing services with a smaller competitor, the court departs from both the precedent and the policies underlying the law of monopolization.

Unilateral refusals to deal by firms with monopoly power—that is, refusals to buy from a certain potential supplier or to sell to a certain potential customer—have been proscribed in several well-defined situations. A firm with monopoly power over a product or service essential to other firms may not, for example, refuse to sell that product or service to those firms merely because they are also competitors.[2] Nor may such a firm seek to exclude competition by refusing to buy from or sell to those who trade with its competitors.[3] The touchstone of illegality in these cases is conduct which unreasonably excludes competition or which utilizes monopoly power gained in one market to distort or limit competition in another market.

The Tenth Circuit has held here, under its newly created "duty to cooperate," that a large firm's refusal to

[2] *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[3] *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (newspaper could not refuse to print advertising of those who also advertised on competing local radio station).

yield to its smaller competitor's demand for joint marketing can constitute illegal monopolization. Section 2 of the Sherman Act has somehow become the vehicle for court-imposed cartelization.

Obviously, the antitrust laws were never intended to encourage, let alone mandate, such a result. The lines of authority ostensibly relied upon by the court of appeals do not support any such conclusion. But wholly apart from the specific flaws in the court's analysis of this case, it must be clear that under no analysis and no set of circumstances can the Sherman Act give rise to a duty to cooperate in joint marketing (including joint fixing of prices and other terms of sale).

Antitrust law has always been suspicious of joint marketing arrangements among rival firms,[4] and for good reasons. First, joint marketing dulls the incentive to compete. More efficient firms will be less motivated to exploit their advantages by improving their products and lowering their prices if they must share the fruits of that exploitation with their less efficient competitors who undertake no such measures. Second, since at least Adam Smith's *The Wealth of Nations*, it has been understood that competitors' get-togethers to discuss marketing may sooner or later lead to discussions of other topics, including prices. From the perspective of antitrust enforcement, such get-togethers are dangerous and should be discouraged by the law, not mandated by it. Third, where, as here, a district court puts itself in the position

[4] "The joint sales agency is a classic cartel device." J. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521, 1555 n.107 (1982). *See National Collegiate Athletic Ass'n* v. *Board of Regents*, 104 S.Ct. 2948, 2966-69 (1984); *cf. Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1182 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 2108 (1983) (the Capper-Volstead Act, 7 U.S.C. § 291, confers antitrust immunity on the joint marketing activities of farm cooperatives).

of supervising mandatory cooperation among competitors, the court steps outside its proper role and assumes powers of economic management analogous to those of the old NRA codes treated in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

These problems are clearly evident in the joint marketing that the court of appeals has mandated, Indeed, they are in many ways accentuated by the district court's role as enforcer of the joint conduct. Ski Co.'s incentive to operate more efficiently will surely be diminished by the court's requirement that it share the benefits of its efficiency with Highlands.[5] It is equally manifest that the discussions between the two firms will involve prices—certainly, the price of the court-mandated joint ticket. Moreover, Ski Co. will be deterred from trying to gain new consumers by *reducing* its own single-day and multi-day 3-area ticket prices, lest it be accused of undermining the multi-day, joint 4-area ticket the court has ordered it to offer. Indeed, by any significant efforts to attract consumers to its three mountains, Ski Co. runs the risk of being held in contempt for detracting from the value of the judicially-mandated joint ticket. The competitive process here has been sorely attenuated.

There is simply no basis for reading the Sherman Act as the court of appeals has done here to impose a duty to cooperate through joint marketing. The law designed to preserve competition was never meant to be the basis for a legal obligation to participate in a cartel. The court of

[5] The sharing of revenues from the mandatory joint ticket means that some of the revenue from additional consumers attracted to Aspen by either firm's improvements will go to the other firm. Moreover, these effects do not cancel out. Rather, they leave *both* firms with less incentive to efficient conduct because each must bear the full cost, but receive less than the full benefit, of its own product and marketing improvements.

appeals' newly created duty to cooperate in joint marketing is in fundamental philosophical conflict with the cases decided by this Court and by other courts of appeals[6] and should be unequivocally rejected.

II. The Court Of Appeals' Decision Creates An Unwarranted Expansion Of The "Essential Facilities" Doctrine

The court of appeals has not only reached a conclusion that is anathema to the Sherman Act, but it has done so in a manner that distorts the "essential facilities" or "bottleneck" doctrine. This Court's opinion in *United States* v. *Terminal R.R. Association*, 224 U.S. 383 (1912), first articulated the principle that a firm or group of firms with monopoly control of a facility necessary to their competitors' business may have a duty to make that facility available to those competitors on reasonable terms. In that case the railroads controlling western terminal access to St. Louis were required to make terminal services available to competing railroads.

This so-called "essential facilities" or "bottleneck" doctrine has since been recognized as a limit on the freedom of firms with monopoly power to choose their customers.

[6] "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States* v. *Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116 (1975); *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979), *cert. denied*, 444 U.S. 1095 (1980) (". . . a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits . . ."); *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 744 (9th Cir. 1979); see also *In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp. 965, 991, 1022 (N.D. Cal. 1979), *aff'd sub nom. Transamerica Computer Co.* v. *IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S.Ct. 370 (1983). 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738m, at 286 (1978).

The doctrine has been held to apply when (1) an essential facility is controlled by a firm with monopoly power, (2) a competitor cannot reasonably duplicate the facility, and (3) the firm with monopoly power denies use of the facility to a competitor, even though (4) the facility could feasibly have been made available to that competitor.[7] Thus, an existing professional football franchise that controlled a city's only stadium suitable for professional sports could not prevent potential rival football franchises from using the stadium.[8] An electric utility could not refuse to "wheel" power to firms intending to compete with it at the retail level.[9] And a firm with virtually absolute control of local telephone service could not deny local interconnections to firms seeking to offer competing long distance telephone service.[10] The evil being prevented in every one of these cases is the same—the use of monopoly power in the monopolized market to distort or exclude competition in another market.[11]

---

[7] *See MCI Communications Corp.* v. *AT&T*, 708 F.2d at 1132-33.

[8] *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). *See also Fishman* v. *Wirtz*, 1981-82 Trade Cas. (CCH) ¶ 64,378 (N.D. Ill. 1981).

[9] *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973).

[10] *MCI Communications Corp.*, 708 F.2d at 1132-33. *See also United States* v. *AT&T*, 1981-82 Trade Cas. (CCH) ¶ 64,277 at 74,231-35. (D.D.C. 1982).

[11] *See MCI Communications Corp.*, 708 F.2d at 1132 ("A monopolist's refusal to deal under these circumstances is governed by the so-called essential facilities doctrine. Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another."

The issue is not, as the court of appeals suggests, whether all bottleneck cases involve vertical integration. App. at 15a-16a. It is a fact that virtually all of the reported essential facility cases involve markets which stand in a vertical relationship to one another. This is so because typically the monopolist controls an "input" or "supply" without which his competitors cannot bring their products to market. The key issue in application of the "essential facilities" or "bottleneck" doctrine is whether monopoly power in one market or one stage of production/distribution is used to distort competition in another market or stage of production/distribution.

The court of appeals seeks to transform this traditional rule against unwarranted exclusion into the basis for its newly created obligation to market services jointly with one's competitors. Ski Co.'s operation apparently enabled it to offer more of something consumers valued—perhaps quality, perhaps variety of skiing experiences[12]—than its smaller competitor could offer. The court of appeals somehow deduced from this fact that Ski Co.'s operation of three of Aspen's four mountains was sufficiently analogous to the *Terminal Railroad* situation to justify invoking the "essential facilities" doctrine. App. at 20a-21a. Therefore, it held that Ski Co.'s refusal to cooperate by sharing its greater quality and variety of services with its competitor through jointly marketed tickets could constitute monopolization under § 2 of the Sherman Act.

In so doing the court of appeals lost sight of both the factual and logical underpinnings of the "essential facilities" doctrine. The court implicitly acknowledged, but refused to be deterred by, its inability even to identify any essential facility in this case.[13] Operating more than one mountain is without question not essential to this business generally—there are numerous locations at which ski firms operate only one mountain. Even within Aspen, essentiality was never demonstrated,[14] or even

---

[12] See note 14 *infra*.

[13] The court's use of "facility" in quotes to refer to Ski Co.'s operation of three mountains (App. 21a) is the only analysis offered of what should have been the decisive consideration.

[14] The court, for example, ignored, although it noted, Highland's claim that the variety of skiing offered on its single mountain was no

defined. Perhaps Highlands would have been more profitable if it operated several mountains or if a joint ticket were utilized. Multiple mountain operation may in that sense be "useful" or "advantageous." But that surely is insufficient to justify labeling defendant's three mountains an "essential facility," as that term has been used heretofore—that is, as something without which the excluded party cannot function in the market.[15]

A simple, but valid, way of determining whether a particular facet of a defendant's business is an "essential facility" is to ask the question: What effect would there be upon the plaintiff if that facet of the defendant's business should simply disappear? If it would make the plaintiff's entry or survival in the business impossible—*e.g.*, the only terminal by which a railroad could enter a city, or the only stadium in a city in which a professional football team could play—then the facility in question is "essential." On the other hand, if elimination of the defendant's facility would in no way hurt the plaintiff's ability to produce and

---

less than defendant offered on its three mountains. App. at 27a, n.20. The Tenth Circuit nevertheless found multiple mountains, virtually by definition, to be essential to the offering of multi-mountain tickets, but that is about as far as the court went in analyzing the meaning of "essential."

[15] The court's erroneous identification of Ski Co.'s three mountains as an "essential facility" may have resulted from its failure to examine the underlying market itself. While the trial court permitted the jury to hold, on the basis of ample evidence, that the *relevant market* (geographic and product) was destination ski resorts in North America, it permitted the jury also to hold that the *relevant submarket* (geographic and product) was downhill skiing services in Aspen, including multi-area, multi-day lift tickets. The court below did not consider the issue concerning these anomalous conclusions because it held that it was not adequately preserved at trial. App. at 5a-12a. We mention the issue here only to suggest a possible cause of the otherwise unaccountable decision of the court of appeals.

market its product—*e.g.*, if Ski Co.'s three mountains were by some geologic magic blended into a single mountain—then the facility could not be called "essential." Indeed, in this case, such disappearance would particularly benefit Highlands by making it more competitive with Ski Co. That fact demonstrates what Highlands' complaint really is—not that Ski Co. denied it on "essential facility," but that Ski Co. is too effective a competitor.

The court's failure to require that the facility be truly essential flowed from its failure to appreciate that the "essential facilities" doctrine is designed to proscribe unreasonably exclusionary conduct, and not to redress competitive disadvantage. The doctrine prevents use of monopoly power to prevent would-be rivals from obtaining the *inputs* without which they cannot produce or deliver a competing product or service. But in this case Highlands sought no reasonable access to any "input" controlled by its larger rival. Rather it sought to make use of the leading firm's *output*—its more attractive, more varied service offering. Highlands did not seek to unclog a bottleneck at all, but rather to piggyback upon Ski Co.'s more desirable service by being allowed to market it to the public in a package with its own, less attractive offering.[16]

---

[16] In *MCI Communications Corp.*, *supra*, the court recognized and rejected a similar claim. Plaintiff claimed that AT&T had wrongly denied it access both to its local telephone lines and to its long distance network (so-called "multipoint service"). The court agreed that AT&T could not use its monopoly power over *local* telephone service to deny its *long distance* competitors connections to local telephone service without which they could not operate. This was an application of classic "essential facilities" doctrine. 708 F.2d at 1132-33. But the court flatly rejected the claim that AT&T had to share its entire long distance network with its smaller long distance competitors who currently lacked the ability to serve much of the country. The court labeled plaintiff's claim to such an entitlement "troubling"

The potential for mischief created by this twisting of the essential facilities doctrine is enormous. A court following the Tenth Circuit's ruling could label as "essential" any of a firm's facilities giving it an attribute important to consumers and then require that those facilities be shared with would-be rivals. Bigger firms often have achieved advantages consumers value—lower (non-predatory) prices made possible by economies of scale, the convenience of more locations and more extensive facilities for credit and after-sale services, the variety of a broader product line, or the capability of keeping one step ahead of other firms' technology. Smaller rivals may now, under the rule laid down here, insist that those firms share those advantages with them or risk treble damage liability. Given the court's failure to define any boundaries on what constitutes an "essential facility," the potential uses of this new doctrine are dangerous to competition.

This Court should avoid this danger by clearly specifying the boundaries of the "essential facilities" doctrine. First, the facility must be truly "essential," and not simply "useful" or "advantageous" to firms lacking access to it. Without such access, in short, the excluded firms must be

---

and squarely held that AT&T's refusal to share its long distance network with its long distance competitors could not be a basis for liability under § 2. *Id.* at 1148-49. *See also Berkey Photo*, 603 F.2d at 284-85 (refusing to find liability in case of claim that large firm was obligated to share its product innovations with its smaller rivals).

The impediment to MCI's claim was that the evil being prevented in bottleneck cases is the use of monopoly power in one market to distort competition elsewhere. In this aspect of *MCI*, as in the instant case, there is no second market in which competition is being distorted—in the market in which they both operate, the weaker firm simply wants to borrow some of the strength of its larger rival and sell it as its own.

unable to function in the market. Second, the doctrine can be applicable only if a firm seeks to exercise monopoly control over some "input" needed by its would-be rivals. It is not applicable where smaller firms seek to borrow the superior products or services of their dominant rivals and amalgamate them with their own for marketing to the public.[17]

III. The Court Of Appeals' Decision Aggravates The Existing Confusion As To The Proper Role Of Intent In Monopolization Cases.

Another of the court of appeals' grounds for its finding of monopolization was that a firm with market power may not choose with whom it wishes to deal if its purpose is to "create or maintain a monopoly." App. at 18a.[18] The court found its authority for this proposition in a line of unilateral-refusal-to-deal cases not involving essential facilities. And it purported in this regard to be following the Seventh Circuit, which, in analyzing a similar question in *MCI Communications Corp.*, had noted: "These cases focus on the intent and competitive effect of the refusal to deal . . . ." 708 F.2d at 1148.

Here, however, the court of appeals ignored the *competitive effect* aspect of these cases and looked only to what it perceived to be the leading firm's subjective intent: "We likewise feel there was sufficient evidence for a

---

[17] In every "bottle neck" or "essential facilities" case decided to date, the plaintiff sought to buy some input from the defendant. In the instant case, by contrast, Highlands sought not to buy anything from Ski Co., but rather to sell lift tickets, jointly with Ski Co., to the public.

[18] The court of appeals purported to follow *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). *Colgate*, however, involved a refusal to sell to a customer, not a refusal to participate with a competitor in a joint marketing arrangement.

finding against defendant on the basis that defendant's intent in refusing to market a multi-day multi-mountain ticket with plaintiff was to 'create or maintain a monopoly.' " App. at 22a, quoting *Colgate*. In so doing, the court never acknowledged the basic differences between the refusal-to-deal cases upon which it relied and Ski Co.'s refusal to market jointly. The court thus upheld a jury verdict of monopolization because of the intent that a firm with market power supposedly demonstrated in deciding to sell independently of, rather than in conjunction with, its smaller rival.[19]

This remarkable conclusion stems in part from the long-standing confusion over the proper role of intent in monopolization cases. It has been repeatedly stated that it takes something beyond the mere possession of market power to constitute the offense of monopolization under § 2 of the Sherman Act.[20] But the courts have struggled to articulate precisely what that something is and what role, if any, intent plays in the inquiry. Lacking clear guidance from this Court, they have adopted different and often inconsistent approaches.

Several courts have resolved this problem by rejecting the intent question entirely in favor of a more "objective,"

[19] The court of appeals also ignored the fact that the jury had been instructed that no such anticompetitive intent need be found. The court of appeals, in short, sought to save the verdict by inferring from it a finding that the jury had expressly been told it need not make and, therefore, did not make. The court of appeals dismissed this argument because no objection had been made to this instruction. App. at 22a n.16. But the court misses the point: it is not that the instruction was objectionable, but merely that the instruction, having been given, necessarily limits the inferences the reviewing court may draw from the verdict.

[20] *See, e.g., Standard Oil Co.* v. *United States*, 221 U.S. 1, 62 (1911) (Sherman Act does not condemn "monopoly in the concrete"); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).

conduct-oriented approach. The Sixth Circuit, for example, has declared its unwillingness to draw any line between general intent and specific intent in assessing the activities of firms with market power: "However one characterizes the approaches used, we think it clear that what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices."[21] The Ninth Circuit has declared the test to be "whether the defendant's acts, otherwise lawful, were *unreasonably* restrictive of competition."[22] Similarly, the Fifth Circuit has held that § 2 is violated only if a firm acts in "an unreasonably exclusionary manner" toward its competitors.[23]

Other circuits have been less willing to abandon the intent inquiry in § 2 cases. The First Circuit, while apparently endorsing the Sixth Circuit's view that what ultimately matters is competitive impact, has also noted that monopolization can be found "[w]hen the foreseeable and proximate consequence of defendant's conduct was unreasonably to perpetuate an already existing monopoly by excluding a potential competitor . . . ."[24] The Eighth Circuit has read this Court's opinions as indicating that illegal monopolization occurs if there is *either* a specific intent to monopolize *or* some anticompetitive effect of the dominant firm's actions.[25]

[21] *Byars* v. *Bluff City News Co.*, 609 F.2d 843, 860 (6th Cir. 1979).

[22] *California Computer Products, Inc.* v. *IBM*, 613 F.2d 727, 735-36 (9th Cir. 1979) (emphasis by court).

[23] *Mid-Texas Communications Systems* v. *AT&T*, 615 F.2d 1372, 1387 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980).

[24] *Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 1279 (1983).

[25] *Paschall* v. *Kansas City Star Co.*, 727 F.2d 692, 696 (8th Cir. 1984); *see, however, Trace X Chemical, Inc.* v. *Canadian Industries, Ltd.*, 1984-2 Trade. Cas. (CCH) ¶ 66,089 at 66,077 (8th Cir. 1984).

The trial courts have understandably expressed concern over the "inconclusiveness of the judicial decisions" as to "the applicable standard of intent."[26] And the commentators have observed that the problem is one of "loose language . . . [Courts] have focused on conduct while talking about intent."[27] These inconsistencies in approach and variations between what the courts say and what they do have greatly complicated the difficult task in all § 2 cases: preventing monopolistic abuses without depriving large firms of the opportunity to compete.[28]

The decision in this case shows the potential for confusion and unpredictability if this problem is not addressed by this Court. The court below hopelessly confounded any meaningful analysis of intent and conduct by lifting intent language out of context from cases involving conduct wholly different in competitive effect from the conduct at issue here.[29] The question the court mechanically asked was whether Ski Co. had refused to cooperate

---

[26] *Becker* v. *Egypt News Co.*, 548 F.Supp. 1091, 1097 (E.D. Mo. 1982), *aff'd*, 713 F.2d 363 (8th Cir. 1983).

[27] 3 P. Areeda & D. Turner, *Antitrust Law*, § 626a at 77 (1978).

[28] As Judge Learned Hand put it in *United States* v. *Aluminum Co.*, 148 F.2d 416, 430 (2nd Cir. 1945): "[A]lthough . . . the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."

[29] Businesses typically sell their products and services to those willing and able to buy. Courts may therefore question the motivation of leading firms who refuse to deal with particular customers. But in this case such skepticism is wholly unwarranted because Ski Co. has not refused to deal with any potential buyer of its services. Ski Co. has only refused to enter into a joint marketing arrangement with a competitor. Businesses do not normally market products jointly with their rivals, and their refusal to do so cannot properly be deemed to be evidence of unlawful intent.

in a joint marketing arrangement with a smaller competitor with the intent to "maintain or create a monopoly." In some almost axiomatic sense, Ski Co. may well have had this intent—it may well have rejected joint marketing because it believed that the joint ticket was helping Highlands more than Ski Co. To the extent that declining to aid its smaller competitor would necessarily have preserved Ski Co.'s position in the market, the firm could be said to have "intended" to maintain "monopoly" power.

But this case thus illustrates one of the fundamental problems about looking to intent to determine the boundary of allowable conduct for firms with monopoly power: defining what intent ought to be proscribed. All firms, including those with market power, typically seek to maintain or expand their market shares by a host of practices that are unquestionably legitimate, from lowering their prices to improving the attractiveness of their products. In a sense, all these firms intend to "create or maintain a monopoly"—they want to enhance their own position in the market, and they understand that their growth is inevitably at the expense of their rivals. That desire and that knowledge alone cannot turn normal business behavior into monopolization.

There is no meaningful way for a court to distinguish between the thoughts articulated by those who aim to succeed at competition and the thoughts of those who would destroy it. Nor can the courts articulate in advance what line they intend to draw.[30] The key can only be found in the effect of the defendant's behavior, and not in the

---

[30] *See, e.g., Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1372 (9th Cir. 1983) ("Although Timberland may have acted with the motive of making things difficult for Cascade, such subjective intent does not constitute anticompetitive purpose within the meaning of our prior cases.").

subjective mental processes of various of its corporate officials.[31] Focusing on conduct will help ensure that truly anticompetitive acts do not go uncorrected merely because the evidence fails to demonstrate that the dominant firm had the requisite monopolistic intent. And, it will yield more comprehensible and rational results than trying to draw a non-existent line between the intent to compete and the intent to create or maintain a monopoly.

Such a movement to a conduct-oriented approach has already occurred in another important area of the law of monopolization—the area of predatory pricing:

> In addition, a test based wholly on intent is unworkable. Even if it were possible to identify those persons within a firm whose intentions are relevant, the meaning of the evidence will usually be obscure. After all, competition consists of winning business from rivals. The intent to preserve or expand one's market share is presumptively lawful. To encourage judges and juries to rely overly on nonprobative data allegedly bearing on a firm's "state of mind" invites the twin mischiefs of (1) burdening litigation with thousands of documents about the firm's motives and calculations; and (2) encouraging inconsistent and quixotic results. Areeda, *Predatory Pricing (1980)*, 49 Antitrust L.J. 897, 899 (1980); see R. Posner, [Antitrust Law (1976)] *supra*, at 189-90.

MCI Communications Corp., 708 F.2d at 1113.[32]

---

[31] There will be cases in which examining those thought processes may help the trier of fact determine whether the conduct at issue had an unreasonably anticompetitive effect. *Berkey Photo*, 603 F.2d at 288. Where the competitive effects of specific conduct are difficult to determine, that use of intent has been informative, *see, e.g., Ass'n for Intercollegiate Athletics for Women* v. *NCAA*, 735 F.2d 577, 583 (D.C. Cir. 1984), and we raise no question about it here.

[32] *See also Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) ("Thus, most courts now find their standard, not in intent, but in the relation of the suspect price to the firm's costs.").

That same rationale applies to monopolization cases generally, as this case all too clearly demonstrates. The intent inquiry has proven itself to be a pointless and time-consuming process, encouraging irrational results. It is like the astronomers' black hole, which absorbs whatever is brought near it but from which nothing, not even light, emerges. Some lower courts have attempted to remedy this problem on their own, but this Court's guidance on this fundamental issue is sorely needed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
Attorneys for Petitioner

September 1984

APPENDIX

UNITED STATES COURT OF APPEALS
THE TENTH CIRCUIT

Nos. 82-1407
and 82-1424

ASPEN HIGHLANDS SKIING CORPORATION,
a Delaware Corporation,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
a Colorado General Partnership,
Substituted Defendant-Appellant,
Cross-Appellee.

FILED
United States Court of Appeals
Tenth Circuit
July 13, 1984
HOWARD K. PHILLIPS
Clerk

APPEAL FROM THE
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
(D.C. NO. 79-Z-1012)

Tucker K. Trautman, (John H. Evans and Owen C. Rouse of Ireland, Stapleton & Pryor, P.C., Denver, Colorado, were also on the brief) for Plaintiff-Appellee, Cross-Appellant

Richard M. Cooper (Edward Bennett Williams and Harold Ungar of Williams & Connolly, Washington, D.C., and David G. Palmer and William W. Maywhort of Holland & Hart, Denver, Colorado, of counsel, were also on the brief) for Substituted Defendant-Appellant, Cross-Appellee

Before HOLLOWAY, DOYLE and SEYMOUR, Circuit Judges

HOLLOWAY, Circuit Judge

Defendant Aspen Skiing Company operates skiing facilities at three of the four skiing mountains in the Aspen, Colorado area, Ajax Mountain, Buttermilk and Snowmass. Plaintiff Aspen Highlands Skiing Corporation operates skiing facilities at the fourth mountain, Aspen Highlands.

For many years, plaintiff and defendant individually offered a wide variety of ski-lift tickets. Defendant's ski-lift tickets were interchangeable among its three Aspen facilities. From the 1962-63 ski-season through the 1971-72 season, plaintiff and defendant offered a joint multi-day ski-lift ticket which could be used at any of the four Aspen mountains. Revenues from the joint ticket were divided through coupons used to measure actual use at the four mountains. II App. 488-49.[1] After a one-year discontinuance of the joint ticket during 1972-73, the joint ticket was reinstituted in 1973-74 through 1976-77. Profits were divided on the basis of surveys of actual use. Plaintiff received 17.5% of the net revenues from the sale

[1] Citations to "App." refer to the joint appendix on appeal prepared by the parties. Citations to "R." refer to the original record.

of four-area tickets during 1973-74, 18.5% in 1974-75, 16.8% in 1975-76, and 13.2% in 1976-77.

Defendant offered to continue the joint ticket for 1977-78 if plaintiff would accept a 13.2% fixed percentage of the revenues. I App. 90-91. Plaintiff objected to this percentage because it was based on the survey for 1976-77, which plaintiff contended was a ski-season marked by below average amounts of snowfall and an unusually low number of skiers visiting the Aspen area. *Id.* at 91. Although plaintiff wanted revenues to be divided on the basis of actual usage, it eventually accepted a fixed 15% of revenues for 1977-78. *Id.* at 92-93.

Defendant offered to continue the joint ticket for 1978-79 if plaintiff would accept 12.5% of revenues. *Id.* at 145-46. Plaintiff again urged a return to a system of sharing revenues on the basis of actual usage. *Id.* at 73, 77-78. The parties were unable to agree and no joint tickets were offered thereafter.

Plaintiff brought suit against defendant under § 4 of the Clayton Act, 15 U.S.C. § 15. Plaintiff alleged that defendant violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1 and 2, by monopolizing, attempting to monopolize, and conspiring to monopolize the sale of downhill skiing services in Aspen, and by conspiring to restrain trade.

After the close of the evidence at trial, the district court granted defendant's motion for a directed verdict with respect to all of plaintiff's claims except the claims of unlawful monopolization and conspiracy to restrain trade between defendant and nonparties.

The jury found for plaintiff on the monopolization claim and for defendant on the conspiracy claim. II App. 603; I App. 31-32. The jury by special interrogatories found that the relevant product market was downhill skiing at

destination ski resorts and that the relevant product submarket was downhill skiing services in the Aspen area, including multi-area and multi-day lift tickets. The jury also found that the relevant geographic market was North America and that the relevant geographic submarket was the Aspen area. I App. 30-31, II App. 601-02. The jury found that plaintiff had suffered $2.5 million in damages by defendant's unlawful monopolization. I R. 33, II App. 603.[2]

The district court thereupon trebled the verdict and entered judgment of $7.5 million plus attorneys' fees and costs. I App. 35, II App. 607. The court also issued an injunction requiring defendant to participate with plaintiff in offering a joint four-area six-day ski-lift ticket for a period not exceeding three years. I App. 36-40. The district court denied motions for judgment notwithstanding the verdict, for a new trial, and for remittitur filed by defendant both after trial and seven months later. I R. 294, 296. The district court issued an order fixing the

[2] On December 22, 1975, the Attorney General of Colorado brought an antitrust suit under federal law against both plaintiff and defendant challenging, among other things, the joint ticket offered by the parties. Exhibit X, III App. The suit was settled by entry of a consent decree on August 19, 1977, which permitted the continued marketing of the joint ticket for a period of five years subject to certain restrictions. Exhibit 26, III App.

Defendant argued that apprehension over continued scrutiny by the Attorney General of Colorado under the consent decree was one of the factors which led it to discontinue the joint ticket after plaintiff refused to accept 12.5% as its share of revenues. I App. 121. On appeal, defendant's position is that "even if it abandoned the joint ticket as a conscious and unequivocal refusal to cooperate with [plaintiff] in the marketing of their respective facilities, it committed no antitrust violation." Brief of Defendant-Appellant, Cross-Appellee, at 7-8.

amount of costs and attorney's fees. *Id.* at 244. Defendant appeals, and plaintiff cross-appeals.[3]

I

The relevant market

On appeal, defendant contends that the district court erred in instructing the jury on the relevant market. The trial court's instructions on the market and submarket are reproduced in the Appendix to this opinion. Defendant argues that the instructions on the relevant product submarket and geographic submarket were inadequate, and that the court erred in instructing the jury that "[t]here can be both a relevant market and a relevant submarket." II App. 584-85. *See* Brief of Defendant-Appellant, Cross-Appellee, at 22-40. Plaintiff says that at trial, however, defendant did not object to the instructions on these grounds. Instead, defendant objected on the ground that the relevant market issue should be decided by the court as a matter of law and should not be submitted to the jury. II App. 580-81.

Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Fed. R. Civ. P. 51. The purpose of this rule is to "prevent a litigant from taking advantage of an error which could be rectified by the court if called to its attention by timely and specific objection." *Corriz* v.

[3] Plaintiff does not seek a new trial. It asserts that the issues raised in its cross-appeal are "pertinent only if defendants are successful on their appeal." Opening Brief of Plaintiff-Appellee, Cross-Appellant, at 1. Because we affirm the trial court's judgment, we need not reach the arguments plaintiff advances in its cross-appeal.

Naranjo, 667 F.2d 892, 896 (10th Cir. 1981), *cert. granted*, 456 U.S. 971, *cert. dismissed*, 458 U.S. 1123 (1983) (by stipulation); *see also Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924 (10th Cir. 1984); *Taylor* v. *Denver and Rio Grande Western Railroad Co.*, 438 F.2d 351, 353 (10th Cir. 1971); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2551 (1971).

Accordingly, Rule 51 requires counsel "to make abundantly clear to the trial court the objecting party's position." *Rogers* v. *Northern Rio Arriba Electric Cooperative, Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978); *see also Palmer* v. *Hoffman*, 318 U.S. 109, 119 (1943)("In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."); *Community National Life Insurance Co.* v. *Porter Square Savings & Loan Association*, 406 F.2d 603, 606 (10th Cir. 1969)(objection to instruction "not sufficient because it was not distinct in explaining the grounds for objection as required by Rule 51"); 9 C. Wright & A. Miller, *supra*, § 2554, at 643 ("grounds must be stated with sufficient clarity"). We have indicated that the grounds stated in the objection must be obvious, plain, or unmistakable. *Corriz*, *supra*, 667 F.2d at 896 (objections on grounds that elements of cause of action were not proven as a matter of law and that there was no evidence to support submission of claim to jury "are shotgun objections which do not meet Rule 51's specificity requirement").

Defendant argues that it did object to the charge on relevant submarket and contends that it took action at trial to sufficiently apprise the district court of these grounds. Defendant points to (1) its objection at the conference on instructions, set out below, where it objected

to any submission of the market question to the jury; (2) its proposed instruction on market definition, which did not include instructions relating to submarkets; and (3) the argument made both in its trial memorandum and in its motion for a directed verdict that the relevant market, as a matter of law, could not be limited to Aspen, "and, *implicitly*, that there can be only one *relevant* market." Reply Brief of Defendant-Appellant, Cross-Appellee, at 2-3 (earlier emphasis added, later emphasis in original).

We note that at the conference in the district judge's chambers, during which both sides made their objections to the trial court's proposed instructions, counsel for the defendant made only the following objection to the relevant market instruction:

> Your Honor, Defendants would object to the instruction concerning relevant market contained on pages 16 through 18 of the instructions. While the defendants recognize that there is case authority supporting the submission of the relevant market—the relevant market question to the jury, we believe that on the record established in this case that the market definition of both the product market and the geographic market should be decided as a matter of law and should not be submitted to the jury.

XIV R. 2290[4]

---

[4] The determination of the relevant market is generally a question of fact. *See Telex Corp.* v. *IBM*, 510 F.2d 894, 915 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802 (1975); *see also Borough of Lansdale* v. *Philadelphia Electric Co.*, 692 F.2d 307, 311 (3d Cir. 1982); *Pinder* v. *Hudgins Fish Co.*, 570 F.2d 1209, 1220-21 (5th Cir. 1978); *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 839 (5th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); ABA Antitrust Section, *Antitrust Law Developments* 110-11 (2d ed. 1984). On that fact question, the defendant raises no issue in this appeal. Defendant concedes that "the evidence supporting the jury's findings on market definition is

A few pages later in the record of the conference on instructions, the judge said she would make one other comment concerning the defendant's request that the court rule as a matter of law on the question of the relevant market; that if she were to rule as a matter of law on the relevant market, she would rule that "the relevant market was Aspen and that the relevant product market was down-hill skiing services;" that after hearing defendant's witnesses she thought there was enough factual contest for the question to go to the jury; and that her not ruling as a matter of law was actually better for the defendant. XIV R. 2292. At that point defendant's counsel said: "Just so the record is clear, *our argument is that you should rule as a matter of law in our favor on that issue.*" *Id.* at 2292 (emphasis added). We feel this part of the record shows the intent of the defendant's objection to the market instructions and that it was not an objection directed to the form of the market and submarket portion of the charge, but was rather that the issue was for the court alone to decide.

Further, as noted the defendant did argue for a directed verdict on the theory that the evidence showed a larger market than just this Aspen area. IX R. 1450. And defendant says that its proposed instructions 13 through 16 "excluded any instruction on submarkets." Reply Brief of Defendant-Appellant, Cross-Appellee, at 2. The proposed instructions on product and geographic market are general statements on the tests for the jury to follow, they state detailed tests on both product and geographic market, and make no reference to any submarkets. I Supp. R. 87-90.

---

irrelevant because this appeal does not present any issue as to the sufficiency of that evidence." Reply Brief of Defendant-Appellant, Cross-Appellee, at 7 n.3 (citation omitted).

We cannot agree that these statements and objections relied on stated "distinctly the matter to which [defendant] objects and the grounds of [its] objection," Fed. R.Civ.P. 51, so as to amount to a proper objection to the market and submarket formulation in the charge. We long have held that the offering of a proposed instruction does not preserve a challenge to the court's instructions under Rule 51, absent a specific objection. *See, e.g., Western Transmission Corp.* v. *Colorado Mainline, Inc.*, 376 F.2d 470, 474 (10th Cir. 1967); *Justheim Petroleum Co.* v. *Hammond*, 227 F.2d 629, 635 (10th Cir. 1955); *Jones* v. *Koma*, 218 F.2d 530, 531-32 (10th Cir. 1955); *see also Johnson* v. *House*, 704 F.2d 1049, 1051 (8th Cir. 1983)("The mere tender of an alternative instruction without objecting to some specific error in the trial court's charge or explaining why the proferred instruction better states the law does not preserve the error for appeal."). In the instant case, we cannot agree that defendant adequately apprised the district court of the grounds on which it now challenges the instructions given. As we stated in a similar context, "[t]he trial judge cannot be held to the standard of omniscience apparently envisioned by defendant[]." *Corriz*, *supra*, 667 F.2d at 896; *cf. Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19, 26-27 (1962) (when counsel made objections at conference on instructions before charge was given and requested instructions on basis of basis of objections, and after charge counsel was told all prior objections would be preserved, waiver did not occur in light of that assurance and prior objections and requests). We are persuaded that the record shows no proper and timely objection on the ground that the market and submarket part of the charge was erroneous.

Defendant says that if we do not agree that a proper objection was made on this ground, then we should con-

sider the point as plain error that generated a miscarriage of justice. Reply Brief of Defendant-Appellant, Cross-Appellee, at 3-4. However, where an objection to an instruction is not made before the jury retires for deliberation, we only review an instruction that is "patently plainly erroneous and prejudicial." *See Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 925 (10th Cir. 1984); *Fiedler* v. *McKee Corp.*, 605 F.2d 542, 548 n.1 (10th Cir. 1979). In a civil case only rarely will we review an error in the instructions when no specific objection was made. *E.g.*, *Glasscock* v. *Wilson Constructors, Inc.*, 627 F.2d 1065, 1067-68 (10th Cir. 1980); *Fabian* v. *E. W. Bliss Co.*, 582 F.2d 1257, 1260 (10th Cir. 1978); C. Wright & A. Miller, *supra*, § 2558, at 672 ("[a]ctual reversals on basis of plain error are rare"). We have said that a new trial should be ordered in the absence of an objection below if an error in the instructions resulted in a "miscarriage of justice."[5] and we review instructions to which proper objection was not made only if they are "patently plainly erroneous and prejudicial."[6]

We cannot say that the district court's instructions on the relevant market resulted in a "miscarriage of justice"

---

[5] *See Brown* v. *McGraw-Edison Co.*, ___ F.2d ___, ___ n.6 (10th Cir. 1984); *Fox* v. *Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir. 1978).

[6] *Brown* v. *McGraw-Edison Co.*, ___ F.2d ___, ___ n.6 (10th Cir. 1984); *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917, 924 (10th Cir. 1984); *cf. Scholz Homes, Inc.* v. *Wallace*, 590 F.2d 860, 864 (10th Cir. 1979) ("plain and fundamental error").

We have also said that an error in an instruction to which there was no objection may be plain error if it was a "generating factor which culminated in a verdict not warranted under the law." *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1330 (10th Cir. 1983), *cert. denied*, ___ U.S. ___, 52 U.S.L.W. 3791 (U.S. May 1, 1984); *see also Fox* v. *Ford Motor Co.*, 575 F.2d 774, 786 (10th Cir. 1978); *Pridgin* v. *Wilkinson*, 296 F.2d 74, 76 (10th Cir. 1961). We understand this to be merely a component of the inquiry whether the instruction was "patently plainly erroneous and prejudicial," or to have caused a "miscarriage of justice."

or were "patently plainly erroneous and prejudicial." Courts repeatedly have cautioned that the plain error exception is limited to exceptional cases where the error "has seriously affected the fairness, integrity or public reputation of judicial proceedings." *Rowe International, Inc.* v. *J-B Enterprises, Inc.*, 647 F.2d 830, 835 (8th Cir. 1981); *see also Morris* v. *Getscher*, 708 F.2d 1306, 1309 (8th Cir. 1983); *Dunn* v. *Sears, Roebuck & Co.*, 639 F.2d 1171, 1176 (5th Cir.), *modified on other grounds*, 645 F.2d 513 (5th Cir. 1981); *Whiting* v. *Jackson State University*, 616 F.2d 116, 126 (5th Cir. 1980); 9 C. Wright & A. Miller, *supra*, § 2558, at 675 ("If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings."). The instructions here were not "hopelessly confusing"[7] and did not fail "to provide even the barest legal guideposts to aid the jury in rationally reaching a decision."[8] Accordingly, the plain error exception to Rule 51 should not be applied to upset the verdict here.

---

[7] *Frederic P. Wiedersum Associates* v. *National Homes Construction Corp.*, 540 F.2d 62, 66 (2d Cir. 1976).

[8] *McNello* v. *John B. Kelley, Inc.*, 283 F.2d 96, 102 (3d Cir. 1960) (*quoted in Frederic P. Wiedersum Associates, supra*, 540 F.2d at 66); *see also Morris* v. *Getscher*, 708 F.2d 1306, 1309-10 (8th Cir. 1983) (instruction constituted plain error when it "provided the jury with virtually no guidance" and "essentially allowed the jury to arrive at a verdict through speculation or conjecture"); *Cruthirds* v. *RCI, Inc.*, 624 F.2d 632, 636 (5th Cir. 1980) (instruction that left "jury to speculate as to an essential point of law" was plain error).

In sum, we hold that defendant's attack on the relevant market instruction is not premised on a proper objection and that the circumstances do not justify setting aside the verdict and judgment on grounds not raised below.

II

Monopolization

Defendant argues that "there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in." Brief of Defendant-Appellant, Cross-Appellee, at 40. Defendant essentially reasons that plaintiff articulated six ways in which defendant's conduct allegedly constituted monopolization, and that none of these created an issue for the jury because none were anti-competitive.

In closing argument, plaintiff's counsel argued that defendant used its power "to deliberately exclude [plaintiff] from a substantial portion of the destination skier visits beginning in the 1977-'78 season, by doing six things:" (1) forcing plaintiff out of the four-area ticket by requiring that revenues be divided below plaintiff's market share; (2) substituting defendant's three area ticket for a four area ticket; (3) marketing and advertising its three mountains in a manner designed to convince consumers that Aspen had only three mountains, not mentioning Aspen Highlands; (4) making an agreement with a tour operator to sell defendant's tickets to the exclusion of plaintiffs; (5) refusing to accept plaintiff's coupons during the 1978-79 season; and (6) raising ticket prices for a

single-day lift ticket thus eliminating plaintiff's ability to offer a multi-area ticket.[9]

A. Waiver

In response to defendant's attack on plaintiff's six theories, plaintiff contends that defendant's argument "is largely a legal one," and because defendant failed to object to the instruction on monopolization, it is the law of the case. The thrust of plaintiff's argument is that defendant has waived its opportunity to challenge the sufficiency of the evidence under legal principles different from those announced in the instructions.

---

[9] In its brief, defendant quotes the following passage from plaintiff's closing argument:

> The evidence has also shown that the Aspen Skiing Corporation, Buttermilk Skiing Corporation, and Snowmass Skiing Corporation together used that power to deliberately exclude Highlands from a substantial portion of the destination skier visits beginning in the 1977-'78 season by doing six things: (1) Imposing a condition that revenue must be divided on the four-area ticket based upon a fixed percentage substantially below the Aspen Highlands' market share previously realized, and to do so, to force Aspen Highlands out of the four area ticket; [2] as part of that, substituting their own three-area, six-day ticket which was provided in place of the four-area ticket and also provided for revenues being divided on the basis of usage; (3) marketing and advertising the Aspen resort in such a manner as to convince the newcomer to Aspen that Aspen only had three mountains rather than four mountains; (4) entering into special agreements with ARI, Aspen Reservations, Inc., the tour operator, for the purpose of inducing ARI, to sell Aspen Skiing Corporation tickets to the exclusion of Aspen Highlands' tickets; (5) refusing to accept Aspen Highlands Adventure Pack coupons during the '78-'79 season, again making it more difficult for Aspen Highlands to compete in the Aspen market; and (6) using their power to raise the individual daily lift ticket price this last year to $22, to completely eliminate Aspen Highlands' ability to offer a multi-area ticket in the Aspen market.

See Brief of Defendant-Appellant, Cross-Appellee, at 41; XIII R. 2214-15.

Defendant challenges the first, second, fifth and sixth theories reasoning that their validity hinges on whether defendant had a duty to cooperate with plaintiff, and that as a matter of law no such duty could have existed. *See* Brief of Defendant-Appellant, Cross-Appellee, at 42, 47, 56, 58. We agree that the validity of the above four theories is premised on the theory of a duty to cooperate. And we agree that defendant has preserved the right to challenge the sufficiency of the evidence of this theory to support the verdict.

Defendant moved for a directed verdict on two occasions. Each time it urged that there was no duty to cooperate. II App. 427-29; *id.* at 561-63 (renewed motion for directed verdict incorporating arguments made at close of plaintiff's case). This preserved defendant's opportunity to challenge the sufficiency of the evidence on that issue under the truly controlling law, regardless of defendant's failure to object to the jury instructions concerning a duty to cooperate. The Fifth, Seventh and Eighth Circuits have held that "[a] proper motion for a directed verdict and its denial will always preserve for review the question whether *under the law truly applicable to the case* there was an adequate evidentiary basis for the submission of the case to the jury." *Coca-Cola Bottling Co.* v. *Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953)(emphasis added); *see also Dual Manufacturing & Engineering, Inc.* v. *Burris Industries, Inc.*, 619 F.2d 660, 662-63 (7th Cir.)(en banc), *cert. denied*, 449 U.S. 870 (1980); *Mid-America Food Service* v. *Ara Services, Inc.*, 578 F.2d 691, 696 n.4 (8th Cir. 1978); *House of Koscot Development Corp.* v. *American Line Cosmetics, Inc.*, 468 F.2d 64, 65-66 (5th Cir. 1972); *Johnson* v. *United States*, 434 F.2d 340, 343 (8th Cir. 1970); *Gorsalitz* v. *Olin Mathieson Chemical Corp.*, 429 F.2d 1033, 1040 n.5 (5th Cir. 1970); *Hanson* v. *Ford Motor Co.*, 278 F.2d 586, 593

(8th Cir. 1960). Thus, "in determining whether a trial court has erred in denying a motion for a directed verdict . . . , it is the applicable law that is controlling, and not what the trial court announces the law to be in his [or her] instructions." *Dual Manufacturing & Engineering, Inc.* v. *Burris Industries, Inc.*, 619 F.2d 660, 663 (7th Cir.)(en banc)(quoting *Coca-Cola Bottling* v. *Hubbard*, *supra*, 203 F.2d at 862), *cert. denied*, 449 U.S. 870 (1980). Therefore we will consider the validity of the theory that defendant had a duty to cooperate or deal with plaintiff in these circumstances.

B. Duty to cooperate or duty to deal

We must decide whether under the truly applicable law there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, together with defendant's other conduct, constituted monopolization in violation of § 2 as a refusal to cooperate, sometimes referred to as a refusal to deal.[10] Defendant replies that this case is not one where any such duty exists, arguing that such a duty can arise only in different circumstances where, through vertical integration, one firm has come to monopolize or control the supply of a component necessary for production, distribution or sale of a rival's product or service.[11] Brief of Defendant-

---

[10] We are mindful that one of the damage years was 1977-78, and that a four-area ticket was offered in that year. We discuss the antitrust injury attributable to this year in *infra* Part III.

[11] Defendant relies on Areeda & Turner, who state that "[i]n general, the monopolist is under no duty to help his rivals enter, survive, or expand." 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 738m, at 286 (1978). Defendant says that while an exception must be made for bottleneck cases where through vertical integration a firm has come to monopolize or control a component essential for a rival's survival,

Appellant, Cross-Appellee, at 44 n.32; Reply Brief of Defendant-Appellant, Cross-Appellee, at 13-14.

The instances in which a monopolist has a duty to cooperate or deal is one of the most "unsettled and vexa-

---

the "so-called 'bottleneck' cases are innapplicable here, however, because there is no claim that [defendant] is vertically integrated, or that it is the sole supplier of some component without which [plaintiff] absolutely cannot bring its product (here, service) to the market." Brief of Defendant-Appellant, Cross-Appellee, at 44-45 n.32. We reject defendant's argument.

We are not convinced that the essential touchstone of bottleneck cases is vertical integration. *See, e.g.*, P. Areeda & D. Turner, *Antitrust Law* ¶ 728b4, at 231 (1978) ("Of course, the integrated monopolist is subject to the same § 2 constraints as the non-integrated monopolist. An integrated monopolist cannot engage in refusals to deal tending unreasonably to exclude actual or potential rivals from his monopoly market."); L. Sullivan, *Handbook of the Law of Antitrust* § 48, at 131 (1977) ("As a matter of policy, to require the monopolist [with a natural advantage monopoly, but without a vertical link to the customer level] to treat all like firms in the same way—to have, one might say, a rational and relevant basis for any distinctions it may make—is to protect vertically related and adjacent markets from being distorted because of arbitrary decisions by the monopolist.").

We decline to adopt a narrow rule that would immunize an unintegrated monopolist from antitrust liability for refusing a competitor access to an essential facility in these circumstances. Vertical integration is not essential to finding a violation of the antitrust laws for a refusal to deal under the intent test. *See, e.g., Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). We believe that it is also apparent that no bright light can be drawn between the bottleneck and intent cases. *See infra* note 13. Given this, and the need for a fact sensitive inquiry in this area, *e.g., Byars* v. *Bluff City News, Inc.*, 609 F.2d 843, 860 (6th Cir. 1980) (courts should "carefully analyze[] the fact situation before them to see whether defendants' conduct was anti-competitive . . . in a case where there is a unilateral refusal-to-deal by a monopolist."), we conclude in the circumstances of this case that the bottleneck doctrine is applicable.

tious" issues in antitrust law. *Byars* v. *Bluff City News Co., Inc.*, 609 F.2d 843, 846 (6th Cir. 1980). "There exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist." *Id.* at 855; *see also MCI Communications* v. *AT&T*, 708 F.2d 1081, 1148 (7th Cir.) *cert. denied*, ___ U.S. ___, 104 S.Ct. 234 (1983).[12] First, there is the so-called essential facilities or bottleneck doctrine. "Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." *Byars, supra*, 609 F.2d at 856 & n.34 (citing *Associated Press* v. *United States*, 326 U.S. 1 (1945) (Associated Press enjoined from continuing its practice of refusing to furnish its service to its members' competitors); *United*

---

[12] There are two elements to the offense of monopolization under § 2 of the Sherman Act. The first is "the possession of monopoly power in the relevant market." The second is "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell, Corp.*, 384 U.S. 563, 570-71 (1966); *see also MCI Communications* v. *AT&T*, 708 F.2d 1081, 1106 (7th Cir.), *cert. denied*, 104 S.Ct. 234 (1983); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). Of course, the fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization. *E.g., Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1187 (10th Cir. 1983). The essentials of these elements were covered by the trial court's instructions. XIV R. 2304.

Defendant's challenge to the sufficiency of the evidence assumes, *arguendo*, that Aspen is the relevant market and that defendant had monopoly power in that market. *See* Brief of Defendant-Appellant, Cross-Appellee, at 40. Reply Brief of Defendant-Appellant, Cross-Appellee, at 7 n.3. (defendant's "appeal does not present any issue as to the sufficiency of [the] evidence" on "the jury's findings on market definition"). Thus, the first element under *Grinnell* necessary to establish a § 2 violation is not at issue.

States v. *Terminal Railroad Association*, 224 U.S. 383 (1912) (railroad companies jointly owning a terminal facility that was only feasible facility when coming to city from west must make facility available to non-proprietor railroads on non-discriminatory reasonable terms); *Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.) (fruit wholesalers who jointly own a warehouse may not exclude competing wholesaler, absent some justification), *cert. denied*, 344 U.S. 817 (1952).

Second, in various contexts courts have employed an intent test under which a "business is free to deal with whomever it pleases so long as it has no 'purpose to create or maintain a monopoly.' " *Byars*, *supra*, 609 F.2d at 855 (quoting *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919)); *see also MCI*, *supra*, 708 F.2d at 1148. "These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility itself is 'essential.' " *MCI*, *supra*, 708 F.2d at 1148 (citing *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (newspaper publisher enjoined from refusing to accept advertisements from customers who advertised with competing radio station); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927) (permissible for jury to infer that defendant's refusal to sell to plaintiffs was in pursuance of purpose to monopolize); *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) (absent any purpose to create or maintain monopoly, Sherman Act does not restrict manufacturer's right to refuse to deal)).

We recognize that the cases do not fit neatly into these two categories. There is a significant amount of overlap between them.[13] Nevertheless the dichotomy, though in

[13] The overlap of the essential facilities doctrine and the intent test is "apparent upon examination of *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed. 2d 359 (1973)." *Byars*, *supra*, 609 F.2d at 857. In *Otter Tail*, the defendant was a vertically integrated power company. It had the capacity to produce power and transmit it over its own lines to municipalities, where it could sell the power at retail prices. When municipalities sought to replace the defendant at the retail level, defendant refused to sell power to the municipalities.

Relying on both the intent test and the bottleneck theory, the district court found that this refusal to deal violated the antitrust laws. *United States* v. *Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971). The Supreme Court in its brief analysis did not distinguish between the two theories. *Otter Tail*, *supra*, 410 U.S. at 377-79; *see also Byars*, *supra*, 609 F.2d at 857. The Court held that the district court finding "that Otter Tail's refusal to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position" was supported. *Otter Tail*, *supra*, 410 U.S. 378.

For other cases discussing a duty to deal but not distinguishing between the essential facilities doctrine and the intent test, see, e.g., *Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1279 (1983); *Mid-Texas Communications, Inc.* v. *AT&T*, 615 F.2d 1372, 1387-88 & n.12 (5th Cir.) ("While in theory there exist differences between the two approaches, in practice the theories are similar."), *cert. denied*, 449 U.S. 912 (1980).

[14] Only general intent, not specific intent, is necessary to a finding of a § 2 violation of monopolization. *See Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Griffith*, 334 U.S. 100, 105-06 (1948). *But see Byars* v. *Bluff City News Co., Inc.*, *supra*, 609 F.2d at 859. "While the completed offense of monopolization under § 2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged." *Times-Picayune Co.*, *supra*, 345 U.S. at 626.

[15] Defendant relies on *Telex Corp.* v. *IBM*, 510 F.2d 894, 926 (10th Cir.) (per curiam), *cert. dismissed*, 423 U.S. 802 (1975), for the

part illusory, is a useful analytical tool.[14] On this record we conclude that both groups of cases apply and support the judgment here.[15]

(1). Essential facilities (or bottleneck)

The essential facilities or bottleneck doctrine has been applied in a variety of circumstances. In *Terminal Railroad*, the defendant railroads jointly owned the only feasible terminal for rail traffic coming to St. Louis from the west. The Court decreed that in the special circumstances of the terminal and bridge facilities, the railroad companies and terminal company should provide reasonable access to the facility for competing railroads. *Terminal Railroad, supra*, 224 U.S. at 411. In *MCI Communications* v. *AT&T, supra*, 708 F.2d at 1133, the doctrine was applied where the competing defendant system controlled access to the communications facility essential to operation of its competitor. The Seventh Circuit identified four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *MCI, supra*, 708 F.2d at 1132-33. Evidence was presented on these factors here.

First, there is no dispute that defendant controlled three of the four skiing mountains in the Aspen area. If defendant refuses to market a multi-day multi-mountain ticket with plaintiff, plaintiff cannot compete in the mar-

---

proposition that its marketing of a three-mountain ticket was one of the "ordinary marketing methods available to all in the market," and therefore could not violate § 2 of the Sherman Act. Brief of Defendant-Appellant, Cross-Appellee, at 48.

We need not decide that it was or would be illegal to offer a three-mountain ticket in competition with the four-mountain ticket. We believe that all of the evidence should be examined together, and we do not consider defendant's marketing of a three-area ticket in isolation from its other conduct. *See infra* note 18.

ket for such tickets. Yet, defendant through its control of three of the four mountains can continue to offer such a ticket. We believe this is sufficiently analogous to *Terminal Railroad* to satisfy the element of control of an essential facility. Second, there was evidence concerning the difficulty of developing another ski area in Aspen due to regulatory restrictions, and delays, and the expense and time required to develop new mountains. *E.g.*, IV R. 377-79; VI R. 790-91; XII R. 2079-82. Third, there is no dispute that defendant denied the use of the "facility" to plaintiff. Defendant admits that it refused to continue to market a joint ticket with plaintiff. *See* Brief of Defendant-Apellant, Cross-Appellee, at 42-48. Fourth, there was evidence that it was feasible for defendant to provide access to the "facility." Prior to this litigation, plaintiff and defendant had marketed a joint multi-day multi-mountain ticket. There was testimony that defendants refused to accept coupons from plaintiff's Adventure Pack, although the coupons were at least as convenient as checks and credit cards. III R. 330-31.

We are not convinced by defendant's arguments based on its restrictive analysis that this is not a case of a vertical integration bottleneck. The substance of an essential facilities case was made. We must remember that this issue is raised by a claim of error in the denial of defendant's motion for a directed verdict and for judgment n.o.v. In that connection we must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. *See, e.g., Hurd* v. *American Hoist and Derrick Co.*, ___ F.2d ___, ___ (10th cir. 1984); *Yazzie* v. *Sullivent*, 561 F.2d 183, 188 (10th Cir. 1977). We hold that in these circumstances there was sufficient proof to sustain the verdict on the basis of a duty to deal or cooperate, and wrongful refusal to deal.

(2). Intent

We likewise feel there was sufficient evidence for a finding against defendant on the basis that defendant's intent in refusing to market a multi-day multi-mountain ticket with plaintiff was to "create or maintain a monopoly." *Colgate, supra*, 250 U.S. at 307.[16] By refusing to cooperate with plaintiff, defendant became the only business in Aspen that could offer a multi-day multi-mountain skiing experience. This is an important factor to attract Aspen skiers who seek variety. I. App. 191, 243. There was evidence that defendant refused to offer a four mountain ticket, despite skiers' frustration over its unavailability. II App. 525-33.

[16] Defendant argues that "[t]he verdict cannot be construed as based on a finding that [defendant's] refusal to cooperate was intended, or was motivated by a purpose or desire, to achieve or maintain monopoly power" because the trial court "instructed the jury that no such finding was necessary." Brief of Defendant-Appellant, Cross-Appellee, at 47 n.34. We must reject defendant's argument.

There was no proper or timely objection to the formulation of the intent instruction, as required by Rule 51. Fed. R. Civ. P. 51. Moreover, the charge correctly stated that "[w]illfully as used in these instructions means acting knowingly and deliberately, but it does not mean that [defendant] must have specifically intended to achieve or maintain monopoly power." XIV R. 2310. Under § 2 general intent is all that is required to support a monopolization claim; only for a mere attempt to monopolize is specific intent required to be shown. *E.g., Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953); *United States* v. *Griffith*, 334 U.S. 100, 105-06 (1948); *Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 103 S.Ct. 1279 (1983); *see also Bank of Utah* v. *Commercial Security Bank*, 369 F.2d 19, 26 (10th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967). *But see Byars* v. *Bluff City News Co.*, 609 F.2d 843, 859 (6th Cir. 1980). The trial judge was instructing the jury as to the elements of the offense of monopolization, not an attempt to monopolize, and she properly instructed that specific intent was not an element of that offense.

To compete with defendant's three-mountain ticket, plaintiff developed an "Adventure Pack." This was a six day ticket designed to permit skiers to ski three of the six days at defendant's mountains. To do this, plaintiff included vouchers in the packet that theoretically were negotiable at defendant's ticket windows. Although there was evidence that these vouchers were guaranteed by a bank, and easier to accept than checks or charge cards, defendant refused to accept them. III R. 328-35. After plaintiff modified its Adventure Pack to eliminate any of defendant's objections, IV R. 504-05, defendant raised the price of its single-day ticket to $22.00, thereby making it unprofitable for plaintiff to market its Adventure Pack. IV R. 534-35; IX R. 1424-25.

We hold that there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket,[17] considered together with its other conduct, showed its intent to create or maintain a monopoly and thus a violation of § 2.[18]

[17] The trial judge's charge referred to the duty to cooperate with a business rival and said that a refusal to deal with a competitor "does not violate Section 2 if valid business reasons exist for that refusal." XIV R. 2311.

[18] Defendant argues that each of the "six things" on which plaintiff relied to demonstrate that it was deliberately excluded from the destination skier market must be supported by sufficient evidence to support a § 2 verdict. *See supra* note 9. Defendant reasons that if we "uphold[] the legal sufficiency and proof of one or more, but not all, of [plaintiff's] theories, then [defendant] is entitled to a new trial." Brief of Defendant-Appellant, Cross-Appellee, at 59-60.

Defendant relies on *Northeastern Telephone Co.* v. *AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) for the above

III

Injury

Defendant argues that even assuming that it abused its monopoly power, plaintiff cannot recover because it has

---

proposition. In *Northeastern*, the Second Circuit reversed and held that plaintiff failed to prove five of the six types of conduct it alleged were anti-competitive. Because the interrogatories submitted to the jury did not permit the court to determine whether the jury based its damage award on any of the five types of conduct that plaintiff had failed to prove were anti-competitive, the Second Circuit remanded for a new trial. We cannot agree that each one of the "six things" which plaintiff argued demonstrated abuse of monopoly power, taken alone, must be supported by sufficient evidence to find a § 2 violation. We reach this conclusion for two reasons.

First, defendant's argument would require that we view each of the "six things" in isolation. To do this however would be contrary to the Supreme Court's admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also Associated Press* v. *United States*, *supra*, 326 U.S. at 14; *Northeastern Telephone* v. *AT&T*, *supra*, 651 F.2d at 95 n.28 (recognizing rule in *Continental Ore* but distinguishing it where proof was "utterly lacking" in "numerous critical respects"); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 459 (9th Cir. 1966), *cert. denied*, 387 U.S. 932, *rev'd on other grounds*, 389 U.S. 384 (1967); *GVF Cannery, Inc.* v. *California Tomato Growers Association, Inc.*, 511 F. Supp. 711, 716 (N.D. Cal. 1981). Plaintiff's evidence should be viewed as a whole. Each of the "six things" viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation. It is enough that taken together they are sufficient to prove the monopolization claim.

Second, defendant never objected to the instructions that required the jury to consider the evidence as a whole. XIV R. 2295 (jury instruction); XIV R. 2290-92 (defendant's objections to instructions). In fact, the trial judge instructed that the plaintiff is "not required to prove every one of its allegations about anti-competitive conduct.

failed to establish that defendant's unlawful conduct caused plaintiff injury in its business or property. Such injury is an essential element that plaintiff must prove to recover under the antitrust laws. *E.g.*, *Central National Bank* v. *Rainbolt*, 720 F.2d 1183, 1187 (10th Cir. 1983); *Mountain View Pharmacy* v. *Abbott Laboratories*, 630 F.2d 1383, 1389 (10th Cir. 1980); *World of Sleep, Inc.* v. *Stearns & Foster Co.*, 525 F.2d 40, 43-44 (10th Cir. 1975). Plaintiff's damage evidence covered four skiing seasons—1977-78 through 1980-81—and included expert testimony on such damages with estimates ranging from $3,162,100 to $4,708,600. *See, e.g.*, Plaintiff's Exhibit 101.

Defendant reasons that plaintiff sought to show that its business would have been more profitable if defendant had agreed to market a four-mountain ticket and had not marketed its own three-mountain ticket; that the only evidence that plaintiff relied on to show this was that of its

---

Once again, you have a problem for judgment, for thorough and sensitive weighing of the evidence." XIV R. 2213-14. Moreover, defendant did not submit more specific interrogatories that would have required the jury to make the grounds for its decision clear. I R. 143-45 (defendant's special interrogatories on monopolization). In these circumstances, we should uphold the general verdict if the proof on various theories is sufficient to sustain the general verdict. *See e.g.*, *Union Pacific Railroad Co.* v. *Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968) (absent pertinent objection to charge or request for specific interrogatory, a general verdict is upheld where there is substantial evidence supporting any ground of recovery in favor of an appellee); *see also Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1176-77 n.20 (10th Cir. 1981), (en banc) (plurality opinion) *cert. denied*, 104 S.Ct. 92 (1983); *Comins* v. *Scrivener*, 214 F.2d 810, 814 (10th Cir. 1954). In the instant case, we hold that there is sufficient evidence to find that defendant had a duty to cooperate in marketing a four-mountain ticket, and that its refusal to do so, considered together with its other acts, supported the finding of monopolization.

expert, Mr. Farwell; and that this testimony should have been excluded because it was grounded on two false assumptions. *See* Brief of Defendant-Appellant, Cross-Appellee, at 60-62; Reply Brief of Defendant-Appellant, Cross-Appellee, at 15-16. We reject defendant's argument for two independent reasons.

First, there was sufficient evidence of injury, other than Farwell's testimony, to sustain the jury verdict. For example, plaintiff's president and owner, II R. 149, testified that plaintiff was "severely damaged" by defendant's refusal to market a four-mountain ticket. III R. 197; *see also id.* at 195. Plaintiff's financial vice president, IX R. 1374, testified that elimination of the four-mountain ticket had the effect of a loss of revenues during the 1978-79, 1979-80, and 1980-81 skiing seasons; he made projections assuming that plaintiff's "slice of the pie" would stay the same and made a rough estimation of a 50-60% loss attributable to the marketing practices of defendant. IX R. 1386-91, 95. He also testified that as a result of eliminating the four-mountain ticket, plaintiff became "a day ski area in a destination market." IX R. 1425. Moreover, there was testimony that because of the elimination of the four-mountain ticket plaintiff had to decrease the number of its ski patrolmen. IV R. 477. There was sufficient evidence for the jury to conclude that plaintiff proved that it was injured by defendant's unlawful conduct.

Second, we reject defendant's argument that the testimony and exhibits of plaintiff's expert[19] were grounded on

[19] Plaintiff's expert was Ted Farwell of Boulder, Colorado. Mr. Farwell was a ski area planner, consultant and appraiser, with a bachelor's and master's degree in business administration, and 20 years' experience in his field. VIII R. 1163. He was a former competitive skier himself, skiing for the University of Denver, and on three United States Olympic teams. *Id.* at 1170.

two false assumptions, and therefore were inadmissible. Defendant says that the validity of the expert testimony "depended explicitly on two indispensable assumptions: (1) that [plaintiff's] ski areas and those of [defendant] 'are equally desirable in the mind of the consumer;' and, (2) that [defendant] would not offer its own 3-area 6-day ticket during the damage period to attract customers away from the jointly-offered 4-area ticket." Brief of Defendant-Appellant, Cross-Appellee, at 62 (citations omitted) (footnote omitted).

Although Farwell's assumptions may have been open to question, they were not so unsupported that the trial court abused its discretion in permitting admission of the testimony and exhibits. We begin with the general rule that we review a district court's admission or exclusion of expert testimony for abuse of discretion only. *E.g.*, *Scholz Homes, Inc.* v. *Wallace*, 590 F.2d 869, 863 (10th Cir. 1979) ("Trial courts have broad discretion in determining the extent to which expert testimony is admissible."); *see also Garwood* v. *International Paper Co.*, 666 F.2d 217, 223 (5th Cir. 1982) ("the district court's admission or exclusion of expert testimony under Fed.R.Evid. 702 is reviewable only for abuse of discretion").

We cannot say that the admission of this expert testimony was an abuse of discretion. Although there may have been considerable evidence contradicting the expert's assumptions, his assumptions were not without support.[20] *See also Litton Systems, Inc.* v. *A T & T*, 700

[20] There was evidence that plaintiff's mountain was of equivalent desirability to defendant's mountains. There was testimony that plaintiff's mountain was "the finest, well-balanced mountain in the Aspen area." IV R. 502. One witness testified that he "prefer[ed] [plaintiff's mountain] as a ski area," and that he recommended plain-

F.2d 785, 822-25 (2d Cir. 1983) (expert's damage projections admissible because assumptions on which they were based were supported in record), *cert. denied*, ___ U.S. ___, 104 S.Ct. 984 (1984). Moreover, "the full burden of exploration of the facts *and assumptions* underlying the testimony of an expert witness [is] squarely on the shoulders of opposing counsel's cross-examination." *Smith* v. *Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980)(emphasis added), *cert. denied*, 450 U.S. 918 (1981).[21] We therefore conclude that permitting the jury

---

tiff's ski school over the others because it is a "friendly area." VII R. 983; *see also id.* at 985-86. There was also testimony from a member of defendant's board of directors that if a four-mountain ticket had been offered in 1978-79, defendant would *not* have marketed its three-mountain ticket at the same time. Exhibit. 33, III App.; V R. 585.

[21] Defendant also argues that Farwell's projections "were attributed at least in part to what the trial court found to be [defendant's] *lawful* competition—its offering of its own 3-area ticket." Brief of Defendant-Appellant, Cross-Appellee, at 66 (emphasis in original). Defendant argues that the judgment must be reversed because, as in *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975), plaintiff's expert relied on defendant's lawful conduct in projecting damages. We disagree for two reasons.

First, we have explained above that we must look at the evidence as a whole in determining whether defendant violated § 2. Whatever the propriety of marketing its own three-day ticket in other circumstances, we must conclude that defendant cannot complain of Farwell's reliance on its offering of the three-day ticket in conjunction with the other evidence of monopolization in this case, especially where defendant has acquiesced in the jury's return of a general verdict. "But however innocent such agreements might be, standing alone, they would assume quite a different aspect if utilized as essential features of a program to hamper or destroy competition." *Associated Press*, *supra*, 326 U.S. 14.

Second, Farwell's projections do not assume that the three-day ticket is illegal. Instead, the projections merely assume that defend-

to consider the testimony from plaintiff's expert was not an abuse of discretion.[22]

Defendant also argues that plaintiff failed to show that it was injured by reason of an antitrust violation for the 1977-78 ski season. Defendant contends that a four-mountain ticket was offered in 1977-78 and therefore any injury suffered by plaintiff during this season was based on defendant's lawful offering of its own three-area ticket. Brief of Defendant-Appellant, Cross-Appellee, at 76-78; Reply Brief of Defendant-Appellant, Cross-Appellee, at 19-21.

This argument ignores the evidence before the jury of antitrust injury suffered by plaintiff in having to accept 15% as its share of net revenues from the sale of four-area

---

ant would refrain from offering the three-day ticket. As we have explained earlier, there is support in the record for this assumption. *See supra* note 20.

[22] Defendant makes a broad challenge to the admission of the testimony of plaintiff's expert. In addition to the challenge that the testimony was inadmissible because grounded on false assumption which we have rejected, defendant also argues that even if the expert evidence was otherwise admissible it should have been excluded as misleading and confusing. *See* Fed.R.Evid. 403. Brief of Defendant-Appellant Cross-Appellee at 68. We note that under Rule 403, Fed. R.Evid., the "task of balancing the probative value of evidence against danger of confusion of the issues is one for which the trial judge because of his [or her] familiarity with the full array of evidence in the case, is particularly suited." *Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977). We will not disturb the trial court's decision on this issue unless it is an abuse of discretion. *See, e.g.*, *Whiteley* v. *OKC Corp.*, 719 F.2d 1051, 1057 (10th Cir. 1983); *Texas Eastern Transmission Corp.* v. *Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978); *Rigby* v. *Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir. 1977). We cannot say it was an abuse of discretion to refuse to exclude the expert's testimony under Rule 403.

tickets during 1977-78. Plaintiff's counsel contended in closing argument that defendant had used its market "power to deliberately exclude [plaintiff] from a substantial portion of the destination skier visits beginning in the 1977-'78 season by [, among other things,] [i]mposing a condition that revenue must be devided on the four-area ticket based upon a fixed percentage substantially below [plaintiff's] market share previously realized, and to do so, to force [plaintiff] out of the four-area ticket." II App. 574.

In years preceding 1977-78, revenues from the sale of the joint four-area tickets were divided on the basis of actual use. In all but one of these seasons, plaintiff received between 16.8% and 18.5% of the revenues based on actual use of its facility. Only during 1976-77, a season that plaintiff contended was marked by below average amounts of snowfall and an unusually low number of skiers visiting the Aspen area, did plaintiff's share of the revenues based on actual use fall below 16.8%. Its share during this season was 13.2%. Defendant offered to continue the joint ticket for 1977-78 if plaintiff would accept a 13.2% fixed percentage of the revenues. III R. 270-71. Plaintiff objected to this percentage because it was based on the survey for 1976-77. *Id.* at 271. Plaintiff's vice president testified that "it looked pretty obvious to us that [defendant] had no intention of really having a four-area, six-day ticket with us, and we felt that our own [sic] chance of keeping this thing alive was to accept some type of a fixed percentage, because [defendant was not] going to go along with a survey [of actual use]." *Id.* at 273. As a result, plaintiff offered a "compromise" deal in which it would accept the average of its previous three years as its share of the revenue for 1977-78. *Id.* The parties eventually settled on 15% as plaintiff's share of the revenues for the 1977-78 season.

We conclude that there was sufficient evidence for the jury to conclude that plaintiff was injured through the exercise of monopoly power by defendant's acts in compelling plaintiff to accept 15% as its share of the profits from the joint four-area ticket during the 1977-78 season, rather than dividing revenues on the basis of actual use. And of course, with respect to the 1978-79, 1979-80, and 1980-81 years defendant did refuse to deal with plaintiff in the marketing of a four-mountain ticket, in addition to its other acts.

The expert testimony thus supported the jury inference of injury in fact resulting from defendant's violation of § 2, and the testimony of other witnesses as well. In sum, the requirement of proof of injury as an element of plaintiff's case was met. *King & King Enterprises* v. *Champlin Petroleum Co.*, 657 F.2d 1147, 1156, 1160 (10th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1982).

IV

Damages

Lastly, defendant takes issue with the proof supporting the jury's award of $2.5 million in damages, which the district court trebled to $7.5 million. Defendant again challenges the testimony and exhibits of plaintiff's expert Farwell. Defendant contends that Farwell's damage estimates of $4,708,600 under his "Method A" and $3,162,100 under "Method B" are an inadequate foundation for the jury's damage award. Farwell's "Method A" estimate of damages was based on the assumption of a trend of the market share continuing in favor of plaintiff through the damage years projected. Farwell estimated the before tax profit that would have been produced if the defendant's marketing practices had not changed; this method produced the $4,708,600 estimate of damages. Farwell's

"Method B" was more conservative and assumed that the plaintiff would only continue to have the average market share of recent prior years through the damage years projected; this method produced the $3,162,100 estimate of loss resulting from defendant's change in marketing practices.

The Supreme Court has recognized that an antitrust plaintiff is rarely able to prove its damages with mathematical precision. *See, e.g., J. Tavett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation."); *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 123 (1962) ("damages issue in [cases where plaintiff was partially or totally excluded from a market] are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *see also King & King Enterprises* v. *Champlin Petroleum Co.*, 657 F.2d 1147, 1158 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *Cackling Acres, Inc.* v. *Olson Farms, Inc.*, 541 F.2d 242, 246 (10th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977). The Court has emphasized that the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based on relevant data." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 264 (1946). The damage award, however, may not be based on "speculation or conjecture." *Id.*

In Part IV, *supra*, we rejected defendant's challenge to the testimony and exhibits of plaintiff's expert Farwell in the context of proving injury. We similarly must reject defendant's argument concerning the inadequacy of the proof concerning damages, particularly in light of the general rule that "the burden of proving the amount of

damages is less than that required for proving the fact of damage." ABA Antitrust Section, *Antitrust Law Developments* 409 (2d ed. 1984); *see also Story Parchment Co.* v. *Patterson Parchment Co.*, 282 U.S. 555, 562 (1931). As we stated in a similar context:

> If the calculations upon which the loss of profits are based are *estimated in any reasonable way* and the underlying assumptions on which the [expert] relied *are not without support in the record*, the calculations may be upheld as a valid means of measuring loss of profits.

King & King Enterprises, supra, 657 F.2d at 1158. (emphasis added). In light of Farwell's testimony and exhibits, we cannot say that the jury's $2.5 million damage award was based on "speculation or conjecture." *See id.* at 1162-63 ("The weight and probative value of [experts'] testimony was for the jury to decide. . . . 'Even though we may not agree with each step in the [fact finder's] reasoning process, we must affirm . . . unless the findings are beyond the pale of sane judgment.' " (quoting *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.*, 633 F.2d 476, 484 (7th Cir. 1980)); *see also Midwest Underground Storage* v. *Porter*, 717 F.2d 493, 501 (10th Cir. 1983) (upholding jury damages award that was "within the range of the evidence," even though exact amount of award was open to question).

Defendant also argues that the $2.5 million damage award is excessive. The district court rejected defendant's motion for a new trial based, in part, on the claim that the damage award was "grossly excessive." I R. 212; I App. xviii. We must afford the district court's refusal to grant a new trial on the excessive damages claim "considerable deference on appeal." *Blevins* v. *Cessna Air Craft Co.*, 728 F.2d 1576, 1579 (10th Cir. 1984); *see also*

Midwest Underground Storage Inc., 717 F.2d at 502 ("The decision whether to grant a new trial is committed to the informed discretion of the district court, which is generally in a better position to evaluate claims of jury confusion or other error in the verdict.") "Moreover, 'absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate.' " *Blevins*, *supra*, 728 F.2d at 1579 (quoting *Malandris* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981) (en banc) (plurality opinion), *cert. denied*, ___ U.S. ___, 104 S.Ct. 92 (1983)); *see also Hurd* v. *American Hoist and Derrick Co.*, ___ F.2d ___, ___ (10th Cir. 1984).

We cannot say that the district court abused its discretion in denying defendant's motion for a new trial on the basis of the alleged excessiveness of the verdict or that the $2.5 million award is so excessive as to shock the judicial conscience. Indeed, the jury's award was below the estimates of plaintiff's expert Farwell, whose testimony we held to be admissible in *supra* Part III.[23] De-

[23] Defendant criticizes Farwell's damage estimate for 1977-78 on the ground that the four-mountain ticket *was* actually offered during this year, contrary to the apparent assumption of Exhibit 101. However, this defect is not fatal to the verdict when we consider the amount of damages attributed to this year in comparison with the other damage years. Under his more conservative Method B, Farwell attributed between $884,400 and $991,300 in damages for each of the years 1978-79 through 1980-81, during which the four-mountain ticket was not offered. The total damages attributed by Farwell to these three years was over $2.8 million, which was greater than the jury's damage award for the four damage years in question. Farwell's estimate of $354,300 in damages for 1977-78, during which the four-mountain ticket was offered, therefore should be viewed in light of Farwell's estimated damages for 1978-79 through 1980-81 and the actual damages awarded by the jury. *See Midwest Underground Storage, Inc.*, *supra*, 717 F.2d at 501 (upholding jury damages award that was "within the range of the evidence").

fendant's other challenges to certain aspects of the exhibits on which Farwell relied, *see* Brief of Defendant-Appellant, Cross-Appellee, at 79-80, do not convince us that overturning the jury's damage award is appropriate here.

V

Attorneys' fees and costs on appeal

Plaintiff asks that we award it "costs, including reasonable attorneys' fees, on appeal." Reply and Answer Brief of Plaintiff-Appellee, Cross-Appellant, at 84. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover . . . the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

In *Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970), the Supreme Court held that § 4 of the Clayton Act "authorize[s]) the award of counsel fees for legal services performed at the appellate stages of a successfully prosecuted private antitrust action." *Id.* at 223; *see also Alexander* v. *National Farmers Organization*, 696 F.2d 1210, 1211-12 (8th Cir. 1982), *cert. denied*, ___ U.S. ___, 103 S.Ct. 2108, 2110 (1983); *Moore* v. *Jas. H. Matthews & Co.*, 682 F.2d 830, 839 & n.11 (9th Cir. 1982); *Carpa, Inc.* v. *Ward Foods, Inc.*, 536 F.2d 39, 55-56 (5th Cir. 1976); *see generally* 2 S. Speiser, *Attorneys' Fees* § 14:6 (1973). The Supreme Court in *Perkins* indicated that "[t]he amount of the award for such services should, as a general

rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered." 399 U.S. at 223.

Accordingly we remand to the district court to hold a hearing on the appropriate amount of attorneys' fees and costs incurred by plaintiff which are attributable to the appeal in No. 82-1407. With respect to the cross-appeal in No. 82-1424, the issues raised were only to be considered if defendant Aspen Skiing Company was successful in its appeal. *See* note 3, *supra*. In view of these circumstances, we conclude that each side should bear its own appellate costs and attorneys' fees which are attributable to the cross-appeal. On remand the district court should thus determine the appellate costs and attorneys' fees attributable to the appeal in No. 82-1407 and award those costs and attorney's fees to plaintiff.

VI

Conclusion

We are satisfied that the trial was fairly conducted, that the instructions were balanced and fair to both sides, and that no error is demonstrated. Accordingly in all respects the judgment of the district court is affirmed, and the case is remanded to the district court for further proceedings concerning appellate attorney's fees and costs as provided in Part V.

APPENDIX

The district court's relevant market instruction was as follows:

> A relevant market has two components: One is the product market and the other is the geographic market.
>
> Product market: The parties are in disagreement as to what the relevant product market is. Aspen Highlands claims that downhill skiing services in Aspen, including multi-area, multi-day lift tickets is the relevant product market. Aspen Skiing Corporation and its subsidiaries claim that the relevant product market is downhill at destination ski resorts.
>
> Like many issues of fact, this one calls upon you to apply your collective common sense and experience to the record of evidence before you.
>
> The basic idea of a relevant product market is that the product or services within it can be substituted for each other as a practical matter from the buyer's point of view. Two products need not be identical to be in the same market, but they must be as a matter of practical fact in the actual behavior of consumers substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.
>
> One way you can tell whether products are reasonable substitutes for each other is to consider whether changes in the price of one have fairly direct and substantial effects upon the sales of the other. If so, the products are probably in the same market. You can also consider how people in the industry and the public at large view the products, whether the products have similar prices, whether the products are sold to similar customers, and whether they are sold by the same kind of sellers. Other factors which you should consider include the special characteristics

and uses of each product and the overlap between the consumers of different products.

In sum, you are being asked to decide which products compete with each other. No one factor is necessarily decisive; but the more of these criteria that are present, the more likely the particular market is a separate product or service market.

Sub-markets: Once you have determined the relevant product market, you next have to consider whether or not there exists within that product market a relevant sub-market. Even though a group of products are sufficiently interchangeable to be grouped in one product market, there may be within that group a smaller group of products that compete so directly with each other as to constitute a sub-market with in [sic] the larger market; or the products or services of a particular seller may have such particular characteristics and such particular consumer appeal and are sufficiently insensitive to price variations of other products that they constitute a relevant sub-market all by themselves.

There can be both a relevant market and a relevant sub-market or just a relevant market without any relevant sub-market. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts, you must still determine whether downhill skiing services in Aspen, including multi-area, multi-day lift tickets is a sub-market within the larger market.

Relevant geographic market: Second, you must determine [the] relevant geographic market. The relevant geographic market is the area or areas in which these parties and their competitors compete for the sale of products that form the relevant product market. It is the area or areas to which a potential customer may rationally turn for the service or product he needs.

Just as there can be a sub-market within a relevant product market, there can be a sub-market within a relevant geographic market. Your destination [sic] of the geographic market or sub-market must both correspond tc the commerical realities of the ski industry and be economically significant. Thus, although the geographic market in some instances may be national or international, under other circumstances it may be as small as a single town or resort area.

In this case, Aspen Highlands contends that the relevant geographic market is the Aspen area, while Aspen Skiing Corporation and its subsidiaries contend that it is North America. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts and the relative georgraphic [sic] market North America, you may still consider whether downhill skiing services in Aspen, including multi-area, multi-day lift tickets from a relevant product sub-market, and if so, whether the Aspen area is a relevant geographic sub-market.

XIV R. 2305-08.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM - July 13, 1984

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

ASPEN HIGHLANDS SKIING CORPORATION,
a Delaware Corporation,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
a Colorado General Partnership,
Defendant-Appellant,
Cross-Appellee.

JUDGMENT

Nos. 82-1407
and 82-1424
(D.C. No. 79-Z-1012)

This cause came on to be heard on the record on appeal from the United States District Court for the ____ District of Colorado ____ , and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. The cause is remanded to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court.

HOWARD K. PHILLIPS, Clerk

JULY TERM - July 31, 1984

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

ASPEN HIGHLANDS SKIING CORPORATION,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
Defendant-Appellant,
Cross-Appellee.

Nos. 82-1407
and 82-1424

This matter comes on for consideration of appellant/cross-appellee's motion for stay of mandate until September 2, 1984, pending application for writ of certiorari in the captioned cause.

Upon consideration whereof, it is ordered that the mandate is stayed until September 2, 1984, pending certiorari and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

By /s/ _____
ROBERT L. HOECKER
Chief Deputy Clerk

JULY TERM - August 28, 1984

Before Honorable William J. Holloway, Jr., Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

ASPEN HIGHLANDS SKIING CORPORATION,
Plaintiff-Appellee,
Cross-Appellant,

v.

ASPEN SKIING COMPANY,
Defendant-Appellant,
Cross-Appellee.

Nos. 82-1407
and 82-1424

This matter comes on for consideration of appellant Aspen Skiing Company's motion for a second stay of issuance of the mandate pending petition for certiorari.

Upon consideration whereof, the motion is granted. The issuance of the mandate is ordered stayed to and including October 2, 1984, pending the appellant's filing of its petition for certiorari, in the United States Supreme Court.

HOWARD K. PHILLIPS, Clerk

Office - Supreme Court, U.S.
FILED
OCT 29 1984
ALEXANDER L. STEVAS
CLERK

No. 84-510 (2)

In The
Supreme Court of the United States
October Term, 1984

ASPEN SKIING COMPANY,
Petitioner,
vs.
ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
TUCKER K. TRAUTMAN
(Counsel of Record)
JOHN H. EVANS
OWEN C. ROUSE

1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

Attorneys for Respondent

October 25th, 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Whether the Court of Appeals' determination that there was sufficient evidence for the jury to conclude that Petitioner's conduct as a whole, including its refusal to participate in the sale of a four-mountain ski-lift ticket, constituted monopolization in violation of § 2 of the Sherman Act either (a) raises any important questions of federal law which have not been, but should be, settled by the Supreme Court; or (b) is in conflict with the decision of any other federal court of appeals on the same matter.

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
A. *The Ski Industry In Aspen*	2
B. *The Four-Area Ticket*	3
C. *The Effect Of Ski Co.'s Termination Of The Four-Area Ticket And Subsequent Conduct*	6
D. *Court Of Appeals Review Of The Suffciency Of The Evidence*	8
REASONS FOR DENYING THE WRIT	11
I. THE DECISION OF THE COURT OF APPEALS IS MERELY A REVIEW OF THE SUFFICIENCY OF THE EVIDENCE PRESENTED AND NEITHER ANNOUNCES THE RULE NOR HAS THE IMPACT THAT SKI CO. CONTENDS	11
II. IN REVIEWING THE SUFFICIENCY OF THE EVIDENCE, THE COURT OF APPEALS CORRECTLY APPLIED EXISTING LAW	14
A. *Essential Facilities*	16
B. *Intent*	21
CONCLUSION	24
Appendix A	App. 1
Appendix B	App. 5

TABLE OF AUTHORITIES CITED

CASES:

Associated Press v. United States, 326 U.S. 1 (1945) ..... (n.7) 15

Byars v. Bluff City News Co., Inc., 609 F.2d 843 (6th Cir. 1979) 22, (n.14) 23

TABLE OF AUTHORITIES—Continued

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 12

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 21

Gamco, Inc. v. Providence Fruit & Produce Bldg., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) 17, (n.10) 18

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) 18

Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983) 21

Martinez Moll v. Levitt & Sons of Puerto Rico, Inc., 583 F.2d 565 (1st Cir. 1978) ..... (n.4) 9

MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) 18

Mid-Texas Communications, Inc. v. AT&T, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980) 22

Pacific Engineering & Production Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977) 22

United States v. Grinnell Corp., 384 U.S. 563 (1966) 22

United States v. Johnston, 268 U.S. 220 (1925) ..... (n.8) 16

United States v. Otter Tail Power Co., 331 F. Supp. 54 (D. Minn. 1971), *aff'd. in relevant part*, 410 U.S. 366 (1973) 14

United States v. Terminal Railroad Association, 224 U.S. 383 (1912) 15, (n.7) 21

Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) 17

TABLE OF AUTHORITIES—Continued

Pages

STATUTES:

Sherman Act § 2, 15 U.S.C. § 2 ..... passim

OTHER AUTHORITIES:

Rule 50(a), F.R.C.P. ..... (n.4) 9

STATEMENT OF THE CASE

Respondent, Aspen Highlands Skiing Corporation ("Highlands"), must emphasize to this Court that *certiorari in this matter is being sought to review a determination by the Tenth Circuit Court of Appeals that sufficient evidence was presented in the trial of this action to support a jury's general verdict of monopolization.* Because sufficiency of the evidence would also have to be considered by this Court were certiorari to be granted, Highlands therefore presents its own Statement of the Case to review the procedural posture of this matter and alert the Court to the evidence omitted or misstated in the selective recitation presented by Petitioner, Aspen Ski Co. ("Ski Co."), in its cursory Statement of the Case.

Contrary to the assertion made at page 3 of the Petition for Certiorari, the focus of this case was far broader than "Highlands' contention that Ski Co. was obligated to cooperate with Highlands in jointly offering certain ski-lift tickets to the public." In its petition, at page 4, Ski Co. asserts that the "alleged refusal by Ski Co. to join with Highlands in offering a joint ticket was the basis of Highlands' claim of monopolization under § 2 of the Sherman Act." This assertion is surprising in view of Ski Co.'s strenuous argument on appeal that Highlands' monopolization claim was premised on six separate theories of liability. See Appendix to Petition, pp. 12a-13a.[1]

Ski Co.'s single-focus assertion is also erroneous in that it glosses over the evidence and ignores what the

---

[1] The decision of the Tenth Circuit Court of Appeals in this matter is reprinted as an Appendix to the Petition herein. For the Court's convenience, citations in this Brief to the decision have been made to the pages as set forth in the Appendix.

Court of Appeals concluded in reviewing the monopolization claims. The Court concluded "that there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, *considered together with its other conduct,* showed its intent to create or maintain a monopoly and thus a violation of § 2." Appendix to Petition, p. 23a (emphasis added). Any review on certiorari would therefore have to include a consideration of *all* the evidence presented to the jury concerning Ski Co.'s varied conduct. That evidence was extensive but must be summarized here for a proper appreciation of the question actually decided by the jury and reviewed by the Court of Appeals.

A. The Ski Industry In Aspen

The ski industry in Aspen, Colorado, began in 1945 when Aspen Skiing Company ("A.S.C.") was formed to develop Aspen Mountain, an area appealing mainly to expert skiers. In 1958, in an effort to develop a more balanced ski mountain, Whipple Van Ness Jones founded Highlands and began the development of the ski area there. In that same year, several individuals formed Buttermilk Mountain Skiing Corporation ("Buttermilk") and embarked upon the development of the Buttermilk area as a teaching mountain for beginners. Thus by the early 1960's there were three separate corporations offering downhill skiing services in the Aspen area. In 1962, to make this multimountain aspect of Aspen more readily accessible to consumers, the companies began offering to the public a multi-day, coupon-type ticket that allowed the skier to exchange a coupon for a daily lift ticket at any one of the areas. In 1963 A.S.C. acquired Buttermilk as a wholly-owned subsidiary through a stock exchange. In 1965 the Janss Corporation obtained a permit from the United States Forest Service for the development of a ski area in the Snowmass area, adjacent to Aspen. Subsequently, the Janss Corporation entered into a joint venture with A.S.C. for the development of this area and in 1967 the Janss Corporation assigned all of its rights in the permit to the Snowmass Skiing Company, which was formed as a wholly-owned subsidiary of A.S.C. Thus, A.S.C., the predecessor of Ski Co., amassed its monopoly power over ski facilities in Aspen through a pattern of acquisition of competitors and potential competitors.

B. The Four-Area Ticket

In the early 1960's, Highlands and Ski Co. began promoting and marketing a multi-day, coupon-type ticket that could be used to obtain ski lift services at either of the areas operated by the two parties. By the end of the 1960's, after Ski Co. had acquired Buttermilk and Snowmass, the multi-area ticket afforded the skier an opportunity to choose among all four of the areas at Aspen in deciding where to ski on any particular, day. Also, by the end of the 1960's, this multi-area ticket had evolved into a six-day package in recognition of the fact that most skiers came to Aspen for a week-long stay. Although Ski Co. offered its own three-area, multi-day ticket at this same time, the four-area ticket was far more popular.

In 1973, the parties introduced a four-area, six-day ticket in a new format—a card that could be worn on a string around the neck and be punched for each day that it was used for skiing. Because there were no coupons or other physical evidence to show where the holder of a multi-day, multi-area ticket had skied on a particular day,

it was necessary to implement a new system for determining the usage of the four-area ticket so that revenues from its sale could be properly allocated between Highlands and Ski Co.

The parties developed a survey procedure to measure actual usage of each mountain by the four-area ticket holders. The percentage of use for each area arrived at from this count was then used to determine how much of the revenue from four-area ticket sales would be received by Highlands and Ski Co. The percentages earned by Highlands under this system were 17.5% for 1973-74, 13.5% for 1974-75, 16.8% for the 1975-76 ski season and 13.2% for the 1976-77 ski season, a year in which snowfall was unusually sparse and attendance at ski areas throughout the state was markedly lower than average.

After the 1976-77 ski season, D.R.C. Brown, President of Ski Co. and of its subsidiaries, unsuccessfully attempted to convince the Board of Directors of Ski Co. to terminate the four-area lift ticket. Thereafter, Mr. Brown decided that Highlands should be offered a fixed-percentage share of the revenues from the sale of the four-area ticket during the upcoming 1977-78 ski season, rather than a percentage determined by the usage survey. Thus, Ski Co. offered to continue participation with Highlands in the sale of a four-area ticket only on the condition that Highlands accept a fixed 13.2% of the revenues, its share from the previous, low-snow year. Highlands protested and sought to obtain some agreement whereby revenues would be divided on the basis of actual usage at the various areas.

Finally, when no such agreement appeared to be forthcoming, Highlands agreed to accept a fixed 15% of the rev-

enues with the hope that the four-area ticket would at least be kept alive and that a new usage-based allocation system could be agreed upon for the following year. Also in 1977-78, Ski Co., for the first time since the 1972-73 ski season, marketed and sold its own three-area, six-day ticket, which was valid only at Aspen Mountain, Buttermilk and Snowmass. Again in 1978, though some members of management opposed the idea, Mr. Brown recommended to the Ski Co. Board of Directors that they cease their participation in the four-area ticket for the upcoming season. The discussion at the board meeting centered on alleged problems with the surveys that had been used to determine each company's share of revenues.[2] The Ski Co. board decided to offer Highlands a flat 12½% of revenues of four-area ticket sales, which at least one board member admitted was an offer that Highlands would have to refuse. Highlands rejected this offer as an unfair proposal that took away all incentive and ability for Highlands to compete to attract customers to its mountain. Highlands pursued negotiations in an attempt to arrive at a compromise that would allow continuation of a four-area ticket with revenues allocated on the basis of actual usage. Ski Co. re-

---

[2] In its Petition, Ski Co. adverts to a suit filed in 1975 by the Attorney General of Colorado and implies that that action challenged and had some impact on the continued marketing of the four-area ticket. That suit challenged a broad array of practices; its only reference to "multi-area" tickets had to do with the fixing of prices for such a ticket. The consent decree settling that action, entered in August, 1977, expressly authorized the continued marketing of joint lift tickets provided that certain standards concerning pricing of those tickets were adhered to for a period of five years. The suggestion that the state antitrust suit was responsible for the discontinuation of the four-area ticket is both contrary to the evidence and at-odds with the jury's rejection of Ski Co.'s business justification defense.

jected all these compromise attempts. Consequently, for the 1978-79 ski season, there was no four-area ticket offered to the public, although Ski Co. continued to promote and market its own three-area, six-day ticket.

C. The Effect Of Ski Co.'s Termination Of The Four-Area Ticket and Subsequent Conduct

The elimination of the four-area ticket and the actions of Ski Co. in connection with and subsequent to that elimination had a devastating effect on Highlands and on consumers. During the 1970's the parties had cooperated in marketing the resort of Aspen, stressing the ambiance of the town and the availability of four mountains of varied skiing. After 1978, Ski Co. continued marketing efforts that sought to capitalize on the appeal of Aspen as a resort, but now they gave the clear impression that Aspen was comprised of only the three mountains owned and operated by Ski Co. Ski Co.'s efforts in this regard included unilaterally changing a sign at Stapleton Airport in Denver (erected previously with funds supplied in part by Highlands), to eliminate its reference to four mountains, and producing advertisements that placed a Buttermilk label over a picture of Highlands. First-time visitors to Aspen, who comprise 20% to 25% of skiers annually, thus could easily have purchased Ski Co.'s three-area, six-day ticket in the mistaken belief that they were thereby securing access to all of the skiing in Aspen. Return visitors to Aspen frequently bought Ski Co.'s three-area, six-day ticket, assuming that it was the multi-area ticket with which they were previously familiar, only to be sorely disappointed when they discovered that the ticket could not be used at Highlands.

In an effort to compete with the three-area, six-day ticket and to continue to offer a four-mountain capability

to skiers who sought the purchase of a convenient multi-day ticket, Highlands attempted to develop and promote to skiers its own multi-area, six-day package, the Adventure Pack. Highlands initially sought to purchase single-day lift tickets from Ski Co. and include those tickets in the Adventure Packs sold to skiers, who could then use those tickets to ski at Ski Co. mountains during a portion of their week-long visits to Aspen. Ski Co. refused to sell its tickets to Highlands. Highlands then attempted to provide its customers access to Ski Co. mountains by including vouchers in its Adventure Pack. The vouchers were secured by funds deposited in a local bank and were designed to be exchanged by skiers for a daily lift ticket at any of the Ski Co. mountains and then redeemed by Ski Co. for the full daily lift ticket price in cash. Ski Co. refused to accept the vouchers. Finally, Highlands put together an Adventure Pack that included twenty-dollar travelers checks that skiers could use to purchase daily lift tickets from Ski Co., which at the time sold for twenty dollars. In response, Ski Co. raised its daily lift ticket price to twenty-two dollars, making travelers check usage impractical and the Adventure Pack economically unmarketable. With Ski Co.'s repeated refusals to cooperate, Highlands was unable to make skiing at Ski Co. mountains readily available to purchasers of the Adventure Pack and was seriously disadvantaged in its ability to attract destination skiers seeking to purchase convenient multi-mountain skiing capability.

From 1978 onward, in addition to its efforts with the Adventure Pack, Highlands sought to reestablish the four-area ticket and proposed various alternatives to Ski Co. that would permit the allocation of revenues on a usage basis without imposing the "burden" of surveys on Ski

Co. One such alternative that was proposed was a return to a coupon system such as had been used in Aspen during the 1960's. This proposal was rejected by Ski Co. as unacceptable, despite the fact that at that very time another Ski Co. subsidiary (controlled by the same common Board of Directors and management), Breckenridge Skiing Corporation, was participating in an identical joint four-area coupon ticket in Summit County, Colorado, an area where Ski Co. did not possess monopoly power.

As a result of the elimination of the four-area ticket, a large proportion of skiers coming to Aspen did not ski at Highlands, although they would have liked to, because their lift tickets were not valid there. Lift ticket sales at Highlands dropped precipitously in the 1978-79 season and declined even further in subsequent seasons.[3] Moreover, participation in the Highlands' Ski School and in NASTAR races at Highlands, activities typically pursued by the vacationers as opposed to the local skier, declined at an even greater rate. This continuing injury prompted the present suit.

D. Court Of Appeals Review Of The Sufficiency Of The Evidence

At trial Ski Co. argued that its refusal to cooperate with Highlands could not be an act of monopolization if such refusal was motivated by valid business reasons.

---

[3] Highlands could not effectively compete for the business of skiers who purchased three-area, six-day tickets from Ski Co. For such skiers to ski at Highlands would require them either to forego one day of skiing they had already purchased from Ski Co. and purchase an additional day from Highlands or to seek a refund under a refund policy that Ski Co. did nothing to publicize, and thereby give up the discount that they had obtained when they purchased the three-area, six-day ticket.

Upon the close of Highland's case and again at the end of the trial, Ski Co. moved for a directed verdict. Neither of these motions mentioned as an issue the sufficiency of the evidence to prove an act of monopolization. The jury received adequate instruction on the issue of monopolization, *drawn largely from the instructions proposed by Ski Co.* For example, the jury was instructed in part that:

> a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.

A complete copy of the trial court's jury instruction concerning monopolization, as well as Ski Co.'s proposal on this issue, are included herein as Appendix A and B, respectively. The jury returned a general verdict finding that Ski Co. had "willfully acquired, maintained, or used monopoly power by anticompetitive or exclusionary purposes rather than primarily as a consequence of a superior product, superior business sense, or historic accident." The Court of Appeals held that the evidence referred to above was sufficient to support this verdict and affirmed.

On appeal, despite having proposed the instruction on refusal to cooperate and the issue of legitimate intent, Ski Co. argued that intent was an improper, irrelevant concept and that a refusal to cooperate could not constitute monopolization *under any circumstances.*[4] In connection

---

[4] In response to Ski Co.'s attempt to obtain appellate review of this issue, Highlands argued that Ski Co., not having challenged the sufficiency of the evidence with respect to monopolization in its motion for directed verdict, had no right to such review. Rule 50(a), F.R.C.P.; *see Martinez Moll v. Levitt &*

(Continued on next page)

with this argument and because its appeal was presented as a challenge to the sufficiency of the evidence, Ski Co. conceded its failure to prove any business justification for its refusal to deal with Highlands.[5] In response to this argument, the Court of Appeals examined the theoretical aspects of a refusal to cooperate, analogizing to cases examining such a refusal in the context of either essential facilities or anticompetitive purpose, and held, under the

---

(Continued from previous page)

Sons of Puerto Rico, Inc., 583 F.2d 565, 568 (1st Cir. 1978). The Court of Appeals, apparently considering the motions to have been adequate, ruled there had been no waiver and considered the merits of Ski Co.'s monopolization argument. Obviously, if certiorari is granted in this matter, Highlands will renew its position that Ski Co. is not entitled to any review on the monopolization issue. Permitting such review has already had the untoward result of allowing Ski Co. to try its case, with the instructions it proposed, before the jury on one legal theory and then, having failed in that endeavor, to try its case again before the Court of Appeals on an entirely new theory.

[5] At trial Ski Co. urged that its refusal to continue with a four-area ticket, dividing revenues on the basis of usage, and its refusal to cooperate with Highlands' efforts to develop the Adventure Pack were motivated by legitimate business reasons. Because the jury, by finding for Highlands on the question of monopolization, rejected this defense, Ski Co. did not pursue it on appeal:

> The jury, on the evidence, could reasonably have accepted [Highlands'] view that [Ski Co.] abandoned the joint ticket not as the result of a failed negotiation, but rather with intent and design not to cooperate at all with [Highlands] in the marketing of a joint ticket. In this appeal, therefore, [Ski Co.'s] position is that even if it abandoned the joint ticket as a conscious and unequivocal refusal to cooperate with [Highlands] in the marketing of their respective facilities, it committed no antitrust violation.

Brief of Defendant-Appellant, pp. 7-8. Thus, the business justification defense was not considered on the appeal and the Court of Appeals review of the evidence necessarily included the implicit assumption that Ski Co. had no legitimate business reason for its refusal to cooperate. See Appendix to Petition, p.4a, fn.2.

circumstances presented here, a refusal to cooperate, coupled with Ski Co.'s other exclusionary and anticompetitive conduct, was sufficient to constitute monopolization. It is this decision that this Court is being asked to review. As the following discussion demonstrates, no such review is warranted.

—o—

REASONS FOR DENYING THE WRIT

The result at trial in this case, and the decision of the Court of Appeals affirming that result, are largely a product of the particular facts presented at trial. The decision of the Court of Appeals is legally correct and is applicable only to this case. It neither concerns any significant public issues nor announces any rule of law that would have precedential impact in any other proceeding. Moreover, even within the factual setting to which it applies, the reasoning of the Court of Appeals is not in conflict with decisions of any other Circuit Court of Appeals or of this Court. The Court of Appeals merely analyzed the evidence of anticompetitive conduct presented at trial and concluded that that evidence was sufficient to establish an abuse of monopoly power. No aspect of that decision warrants certiorari review.

I. The Decision Of The Court Of Appeals Is Merely A Review Of The Sufficiency Of The Evidence Presented And Neither Announces The Rule Nor Has The Impact That Ski Co. Contends.

The first contention Ski Co. advances as a reason for granting certiorari is premised on Ski Co.'s pronouncement that the Court of Appeals has created a new duty to cooperate under which "a large firm's refusal to yield to its smaller competitor's demand for joint marketing" violates the Sherman Act. Petition at 6-7. From this, Ski

Co. argues that the resulting "court imposed cartelization" is inimical to, and a dangerous precedent for, antitrust policy generally and is harmful to the competitive process in Aspen. The fundamental disingenuousness of this argument is that it ignores both the context and the specifics of the Decision. The Court of Appeals plainly did not decide what Ski Co. says it did.

As mentioned, Ski Co.'s appeal with respect to monopolization was confined to an attack upon the sufficiency of the evidence to support the general verdict on that issue. In making that attack Ski Co. abandoned the business justification defense for its conduct, which it had vigorously advanced at trial. Instead its appellate argument was that its intent in engaging in the conduct Highlands challenged was irrelevant and that the verdict should be set aside because none of the conduct at issue was anticompetitive.

It was in this context that the Court of Appeals' decision arose. In examining the issue of monopolization, the Court of Appeals *repeatedly* noted that it was considering all the evidence relating to that charge:

> We must decide whether under the truly applicable law there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, *together with defendant's other conduct,* constituted monopolization in violation of § 2 as a refusal to cooperate, sometimes referred to as a refusal to deal.

Appendix to Petition, p. 15a (emphasis added). See also Appendix to Petition, p. 23a. This consideration of all the evidence as a whole was entirely appropriate. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

Therefore, the decision does not stand for the broad proposition suggested by Ski Co.: that the mere refusal of

a large firm to yield to its smaller competitor's demand for joint marketing constitutes illegal monopolization. Ski Co. did not just "decline to market its services jointly" with Highlands (Petition at 5). Rather, without business justification, it engaged in a *series* of exclusionary activities: (1) Ski Co. was perfectly willing to continue participation in the four-area ticket if Highlands accepted a condition that fixed Highlands' share of the revenues at a level below what skier usage at Highlands would have justified and that stifled competition between the parties; see Appendix to Petition, pp. 29a-30a; (2) Ski Co. refused to sell to Highlands daily lift tickets or accept the vouchers Highlands attempted to use in the Adventure Pack; (3) Ski Co.'s increase to a twenty-two dollar daily lift ticket price made sale of the Adventure Pack impossible; (4) Ski Co. refused to consider a coupon system for continuation of the four-area ticket, despite its contemporaneous participation in a coupon-based, four-area ticket and joint marketing system with its equally-sized rivals in Summit County, Colorado; and (5) finally, Ski Co. engaged in an advertising effort that effectively removed Highlands from the map and operated to convince the newcomer to Aspen that the resort consisted of three rather than four mountains.

The Court of Appeals reviewed, and based its decision on, all this evidence. Its affirmance of the verdict thus stands for no more than the proposition that a jury can properly find a defendant that has committed all the acts Ski Co. engaged in here guilty of monopolization. Such a fact-sensitive decision has neither the policy impact nor the precedential implications that Ski Co. contends.[6]

---

[6] In addition to being based upon a gross mischaracterization of what the Court of Appeals actually decided, Ski Co.'s

(Continued on next page)

II. In Reviewing The Sufficiency Of The Evidence, The Court Of Appeals Correctly Applied Existing Law.

As with the facts, Ski Co. also distorts the manner in which the legal analysis employed by the Court of Appeals took place. In examining Ski Co.'s series of activities, the Court of Appeals merely used an established analytical framework comprised of the two related theoretical approaches—essential facilities and anticompetitive intent—employed in *United States v. Otter Tail Power Co.*, 331 F. Supp. 54 (D. Minn. 1971) *aff'd in relevant part*, 410 U.S. 366 (1973), and a host of other monopolization cases. This reference to the theoretical bases by which a refusal to cooperate could constitute monopolization was necessary because Ski Co. had argued on appeal that as a matter of law "even a monopolist has no duty to cooperate with a competitor." Brief of Defendant-Appellant, p. 42.[7] All that the Court of Appeals did in response to

---

(Continued from previous page)

argument, at page 8 of the Petition, bemoaning the effects of the decision on competition in Aspen, suffers from several other infirmities. First, Ski Co.'s continuing obligations with respect to cooperation with Highlands in making a four-mountain ticket available were imposed by the injunction entered by the District Court. Ski Co. did not challenge either the general appropriateness or the specific terms of that injunction in its appeal. Second, Ski Co.'s lament is based on hypotheses that have absolutely no support in the record that was before the District Court or the Court of Appeals. Finally, the evidence that was introduced at trial concerning the state of competition between the parties during the 1970's, when the four-area ticket was being sold, indicated that competition to attract skiers, once they were in Aspen, to ski at the respective parties' areas was vigorous. After 1977, when Ski Co. began its exclusionary conduct, competition diminished.

[7] Despite its acknowledgement, at page 6 of the Petition, that unilateral refusals to deal by monopolists are proscribed in several situations, Ski Co. argues even more vigorously here that there can never, under any circumstances, be a "duty to cooperate," and that the imposition of such a duty plays havoc

(Continued on next page)

this argument was to look to two analytical models under which such a duty does indeed exist and conclude that the evidence presented here was sufficiently analogous to an essential facilities situation and sufficiently indicative of improper intent to uphold the verdict. *"On this record* we conclude that both groups of cases apply and support the judgment here." Appendix to Petition, p. 19a (emphasis added).[8]

(Continued from previous page)

with antitrust policy. Ski Co.'s insistence on this point is inappropriate for several reasons. First, it overlooks the rationale of, and the relief decreed in, this Court's decision in *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912). There, the defendants' control over an essential facility created a duty to cooperate, as evidenced by the decree requiring the terminal association to admit to its joint operating and marketing mechanism any competing railroad that needed to use the facilities. *Accord, Associated Press v. United States*, 326 U.S. 1 (1945). Second, as already noted, the Court of Appeals did not premise liability on the mere failure to cooperate in "joint marketing." Third, while Ski Co. can now apparently express concern over the parade of horribles that might emanate from "joint marketing," such policy concerns did not deter its willingness to continue a four-area ticket in Aspen in 1977 and 1978, so long as it received more than its fair share of the revenues, or its willingness to enhance its competitive position by participating in a "joint marketing" program in Summit County.

[8] Here again the precedential impact of the court's decision is limited to the particular facts and context of this case:

> The substance of an essential facilities case was made. We must remember that this issue is raised by a claim of error in the denial of defendant's motion for a directed verdict and for judgment n.o.v. In that connection we must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. [Citations omitted.] We hold that *in these circumstances* there was sufficient proof to sustain the verdict on the basis of a duty to deal or cooperate, and wrongful refusal to deal.

Appendix to Petition, p. 21a (emphasis added).

Under these circumstances, the decision of the Court of Appeals is utterly lacking in the far-reaching implications upon

(Continued on next page)

Ski Co. faults this process and contends that in reaching its affirmance of the jury's verdict the Court of Appeals distorted the essential facilities doctrine and "confounded any meaningful analysis of intent and conduct" in the realm of monopolization. However, when the decision of the Court of Appeals is objectively examined, without the distraction of what Ski Co. attempts to read into the decision, in connection with the evidence that the jury must be presumed to have accepted, there is nothing distorted, confusing, or unprecedented about it. The court's application of the essential facilities and anticompetitive intent doctrines was entirely consistent with the body of law that has developed in these areas.

A. Essential Facilities

Ski Co.'s criticism of the Court of Appeals with regard to the essential facilities doctrine centers upon the court's alleged failure either to determine the essentiality of the facilities or to require the existence of some controlled input from one market that was being denied to a competitor for use in delivering a product or service in some vertically related market.[9] Neither contention is worthy of consideration by this Court.

The Court of Appeals properly determined that there is an essential facility involved here—multi-mountain ca-

---

(Continued from previous page)

the law of monopolization that Ski Co. attributes to it and upon which Ski Co. premises its request for certiorari review. This Court does not, and need not, "grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

[9] Ski Co. apparently does acknowledge that the essential facilities doctrine exists and can be, in appropriate circumstances, a proper test for determining illegal monopolization. Also, Ski Co. appears to accept the four-factor test adopted by the Court of Appeals as the determinant for liability.

pacity, *i.e.*, the ability to offer skiers access to more than one mountain during their skiing vacation. The vital importance of this capacity was demonstrated by lay and expert testimony concerning its attractiveness to Aspen skiers, by historical evidence of the use and popularity of various tickets, and by the efforts of Ski Co. itself to acquire and exploit multi-mountain capacity in Aspen, and participate in multi-mountain marketing in Summit County, Colorado. As the Court of Appeals recognized:

> By refusing to cooperate with plaintiff, defendant became the only business in Aspen that could offer a multi-day multi-mountain skiing experience. This is an important factor to attract Aspen skiers who seek variety.

Appendix to Petition, p. 22a.

> If defendant refuses to market a multi-day multi-mountain ticket with plaintiff, plaintiff cannot compete in the market for such tickets.

Appendix to Petition, pp. 20a-21a.

It should be, and was to the Court of Appeals, obvious that Highlands cannot sell multi-mountain tickets without multi-mountain capacity, or reasonable access to such capacity. Just as access to a produce market may be essential to a fruit wholesaler, *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952), or access to transport facilities may be essential for a producer of natural gas, *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1308 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), access to multi-mountain capacity is clearly essential to compete in the market for multi-area lift tickets.

The test that Ski Co. proposes for determining whether a facility is "essential"—what effect would there be if the facility were to disappear—is simply not consistent with the cases that have defined essential facilities. None of the cases considering essential facilities have required the showing [illegible]ki Co. suggests, *i.e.*, for a facility to be essential it must be shown that if it were eliminated a plaintiff's entry or survival in the business would be impossible.[10]

To the contrary, there is an established test for defining essential facilities and that test was applied here. In *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the court held that for a facility to be deemed essential it "need not be indispensable; it is sufficient if duplication . . . would be economically infeasible and if denial of its use inflicts a severe handicap on [competitors]." This same test for essentiality was employed in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) where the court held that the evidence established that local interconnection facilities were essential

---

10 Nor is such a situation a necessary, albiet unstated, component of those cases. Indeed, if the produce warehouse and market in *Gamco* had disappeared, the plaintiff still could have carried on its business; it and the defendants merely would have had equal but more limited access and appeal for their customers. Similarly, if Ski Co.'s three mountains were to become one, multi-mountain tickets would cease to exist and multi-mountain capacity would no longer be a factor in the marketplace, leaving the parties to compete on the basis of the respective appeal of their individual mountain. However, until such a geologic rearrangement occurs, the fact remains that Ski Co. has monopoly power and controls multi-mountain capacity, which continues to be the dominant factor in the market for multi-mountain tickets.

but failed to establish that multi-point interconnection was essential, because there was no showing that "duplication of Bell's intercity lines was economically infeasible or that the denial of access inflicted a severe handicap on market entrants." *Id.* at 1148.[11] In deciding that Highlands could not feasibly develop another ski mountain in Aspen and could not compete in Aspen without multi-mountain capacity, the Court of Appeals correctly applied exactly the same definition of an essential facility. It is manifestly unnecessary for this Court to intervene to refine that definitional process.

Ski Co. next argues that this case is anomalous and the application of the essential facilities doctrine heretical because it differs from "every 'bottleneck' or 'essential facilities' case decided to date [in all of which the] plaintiff sought to buy some input from the defendant." Petition at 15, fn. 17. A review of the record amply demonstrates that no such difference exists.

---

11 It should be noted that Ski Co.'s discussion of the *MCI* multi-point issue, Petition, p.13, fn.16, radically misstates the holding of the Seventh Circuit Court of Appeals. The court did not reject a bottleneck theory with respect to multi-point connections because of the absence of a "second market," as Ski Co. maintains. Rather, the court held there had been a failure to prove that the facilities in question were essential. Moreover, the court did not "squarely" hold "that AT&T's refusal to share its long distance network with its long distance competitors could not be a basis for liability under §2." To the contrary, after finding the bottleneck theory inapplicable, the court went on to examine the refusal under the anticompetitive intent test and found that AT&T could be liable if the FCC had authorized such interconnections. However, the court held that the conditions of regulatory uncertainty prevailing at the time made it impossible to conclude that AT&T was motivated by anticompetitive intent rather than legitimate business purposes, thus precluding liability under the evidence presented.

Highlands seeks to sell multi-mountain tickets in a market where consumers prefer such tickets.[12] To do that, Highlands has sought to purchase from Ski Co. access to multi-mountain capacity, over which Ski Co. has monopoly control, and to include that access in a product, multi-mountain lift tickets, that Highlands seeks to sell to skiers. Prior to Ski Co.'s termination of its participation in the four-area ticket, that purchase of input was accomplished by Highlands paying Ski Co., through a division of revenues, for each day the purchaser of a four-area ticket skied at one of the Ski Co. mountains. After termination of the four-area ticket, Highlands attempted to purchase such access by including in its Adventure Pack lift tickets purchased from Ski Co. or cash-equivalent vouchers that skiers could use to buy lift tickets at Ski Co. mountains.[13] In each instance, Ski Co. refused to sell this essential input to Highlands. For the Court of Appeals to have found the "substance of an essential facilities case" upon such

---

[12] The jury found that the relevant product submarket was downhill skiing services in Aspen, including multi-area, multi-day lift tickets. The Court of Appeals held that the instruction giving rise to this finding was not clearly erroneous and affirmed it. Thus, one of the products within the relevant submarket was multi-mountain tickets. This case definitely does contain a vertical aspect, in that one of the products in the relevant submarket, multi-mountain tickets, is composed of and made up from constituent elements—access to skiing services at more than one mountain in the area. Ski Co. was the only supplier in the market that could provide this constituent element.

[13] Ski Co.'s repeated insistence that Highlands is seeking to borrow its higher quality "output" or piggyback upon its more desirable service, rather than purchase some needed "input," totally ignores all this evidence of Highlands' efforts to buy access, at Ski Co.'s full price, and ignores Ski Co.'s willingness to sell access, although only on anticompetitive terms, in 1977 and 1978.

facts is consistent with the traditionally vertical orientation of such cases and constitutes absolutely no "twisting of the essential facilities doctrine." Just as access to terminal and bridging facilities was a necessary component for the provision of through railroad services in *United States v. Terminal Railroad Association,* 224 U.S. 383 (1912), access to Ski Co.'s multi-mountain capacity was a necessary component for the marketing of multi-mountain tickets. The Court of Appeals recognized this analogy and properly used it to sustain the finding of monopolization. The decision made by the Court of Appeals on the record before it falls squarely within the established boundaries of the doctrine. No new demarcation by this Court is needed.

B. Intent

With respect to the other, alternative, basis for the Court of Appeals' decision—anticompetitive intent—Ski Co. waxes astronomical in arguing that the court has fallen into some "black hole" of confusion regarding the proper role of intent analysis in a refusal to deal case and that intervention by this Court is essential to restore the law to its proper orbit. Again, Ski Co. has misconstrued the Court of Appeals' decision and its relation to the applicable law in this area.

The focus upon intent in determining whether a unilateral refusal to deal constitutes unlawful monopolization finds its origin in this Court's decision in *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927), and has been expressed in a long line of cases holding that a monoplist's refusal to deal is unlawful if it does not arise from legitimate business purposes. *See, e.g., Home Place-*

ment Service, Inc. v. Providence Journal Co., 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Mid-Texas Communications, Inc. v. AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980). The rationale of such cases is that it is appropriate to infer anticompetitive intent from conduct that has no business justification. Some of these same cases, and others, *e.g., Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (6th Cir. 1979), employ, as an alternative, a focus on the impact of a defendant's conduct, reasoning that pursuit of anticompetitive acts that are unreasonably restrictive of competition is a clear indication that a defendant intends to create or perpetuate monopoly power. Regardless of the focus, the touchstone of liability is a defendant's willful, *i.e.*, intentional, acquisition or maintenance of monopoly power, as distinguished from growth or development on account of conduct that is honestly industrial. *Cf. United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Both focuses are directed toward answering the same question: Did the defendant intend to harm competition or was he merely pursuing legitimate business aims? Whichever way the question is framed the answer will be the same because conduct engaged in for legitimate business purposes does not harm competition, as opposed to individual competitors. *Cf. Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). If either line of inquiry inevitably leads to the same result—proper resolution of the willfulness issue framed by this Court in *Grinnell* as an essential element

of the offense of monopolization—it should matter little to this Court that the lower courts have employed varying focuses to reach that end.[14]

Moreover, even if there is a need to orient the focus more upon the impact or effect of a defendant's conduct, beyond that arising from the refusal to deal itself, rather than his motive, as Ski Co. argues, this case does not demonstrate any such need and would be an inappropriate vehicle for pursuing such an attempted reorientation. In its decision here on anticompetitive intent, the Court of Appeals did not base its holding on evidence of subjective states of mind, or even on the mere lack of any legitimate business justification for Ski Co.'s conduct, as indicative of Ski Co.'s purpose to create or maintain a monopoly. Indeed, had the court chosen such a focus, no further inquiry would have been needed because on appeal Ski Co.

---

[14] Ski Co.'s attempt to unearth some conflict amongst the circuits and some lower court confusion regarding the intent issue is specious. The selective lifting of pieces of verbiage from opinions covering differing factual settings does not demonstrate either conflict or confusion—except on the part of Ski Co., in that its discussion of intent roams across the whole field of monopolization rather than focusing on the relevance of intent in a refusal to deal context. None of the cases to which Ski Co. refers shows any conflict on the issue that was before the Court of Appeals: When can a monopolist's refusal to deal with a competitor constitute a violation of § 2? As the decision in *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 860 (6th Cir. 1979), recognizes, the exclusionary impact of the conduct involved in such a situation, which Ski Co. insists should be the predicate for liability, is manifest from the refusal to deal itself. With the existence of exclusionary conduct thus already established, each one of the refusal to deal cases to which Ski Co. cites rests its determination concerning liability upon a factual inquiry regarding the setting in which the refusal took place and whether some legitimate business reason for the refusal existed. That is also what the Court of Appeals did here.

had to concede that it had failed to prove any business justification for its refusal to deal. Instead, the Court of Appeals did exactly what Ski Co. argues that this Court should require. It examined Ski Co.'s refusal to deal along with its other conduct and weighed the impact of that conduct on the marketplace. In its decision on this issue, Appendix to Petition at pp. 22a-23a, it concluded that Ski Co.'s overall pattern of conduct: (1) was exclusionary—it "became the only business in Aspen that could offer a multi-day multi-mountain skiing experience"; (2) frustrated consumers; (3) was unreasonable; and (4) resulted in higher prices for single-day lift tickets. Such conduct was injurious not just to Highlands but to the entire competitive process. The court properly held that such evidence amply showed Ski Co.'s "intent to create or maintain a monoply." That holding is neither inconsistent with, nor contributory to any confusion regarding, the manner in which the lower courts have treated the issue of intent in the context of refusals to deal. Even if any clarification on this issue is needed in the abstract, there is certainly no need of it here.

———o———

CONCLUSION

The decision of the Court of Appeals that the evidence presented at trial was sufficient to support the verdict has no broad precedential impact. Nor does the decision represent any misapplication of established law or demonstrate any confusion regarding unsettled law. The decision was correct. For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 25th day of October, 1984.

IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
TUCKER K. TRAUTMAN
JOHN H. EVANS
OWEN C. ROUSE

Attorneys for Respondent

1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

APPENDIX A

The District Court's monopolization instruction was: On the other hand, if you do find monopoly power, you must consider the second essential element: Whether [Ski Co.]willfully acquired, maintained, or used that power by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes.

"Wilfully" as used in these instructions means acting knowingly and deliberately, but it does not mean that [Ski Co.] must have specifically intended to achieve or maintain monopoly power.

In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its superior business ability and efficiency does not constitute monopolization.

For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which pos-

sesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.

In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.

To sum up, you must determine whether [Ski Co.] gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or submarket.

Conduct which is directed at injuring competitors may be classified either as exclusionary conduct, which is conduct aimed at actual elimination of competition or at preventing it from coming into being, or as anti-competitive conduct, which is action that restricts, interferes with, impairs, or frustrates the efforts of other firms to compete in the relevant market. Although these forms of conduct may be slightly different, they are not absolutely distinct. Therefore, I will use either term, exclusionary or anti-competitive, to refer to the types of conduct which Aspen

Highlands must have proved in order to establish the second essential element on its charge of monopolization.

It can sometimes be difficult to determine the primary quality or nature of an act so as to classify it as honestly industrial or as exclusionary or anti-competitive. Nonetheless—nevertheless, you must decide. Given conduct may both help customers and hurt competitors. If this seems to be the case to you, you must ask yourselves whether it hurts competitors because it appeals to consumers. That is, was the harm to a competitor caused by consumers' preference for Defendants' products? If so, the kind of conduct involved is not exclusionary or anti-competitive because the goal of Section 2 is to protect competition itself rather than a particular competitor's right to thrive.

If a business does poorly because it is faced with vigorous competition, this is not unlawful. In addition, so long as a company which possesses monopoly power acts reasonably, it is not necessary that the company adopt the least restrictive alternative available. It is the choice of an unreasonable alternative, not the failure to choose the least restrictive alternative, that may lead to liability.

However, if the harm, to a competitor is caused by something other than Defendants' success in competing on the merits of its products and operations—if the harm is caused primarily or substantially by the defendants' deliberate efforts to injure or block competition—then you may find that the conduct was anti-competitive. Such conduct, whether to obtain monopoly power in the first place or to hold on to it or make use of it establishes the second element of the offense of monopolization of the particular market involved.

You need not find that monopoly power was gained or maintained or used solely in anti-competitive ways in order to establish this element of monopolization. However, a preponderance of the evidence must show that the anti-competitive conduct played a significant or substantial role. An isolated or trivial episode will not make [Ski Co.] liable for monopolization if monopoly power was in other respects gained, retained, and employed in a fashion that is honestly industrial rather than anti-competitive.

On the other hand, Aspen Highlands is not required to prove every one of its allegations about anti-competitive conduct. Once again, you have a problem for judgment, for thorough and sensitive weighing of the evidence. In the end, you must decide whether Aspen Highlands has carried its burden of proving not merely an isolated or occasional act but a substantial or significant amount of conduct that was exclusionary or anti-competitive in nature.

If you find that Aspen Highlands has not met this burden, then your verdict on the claim of monopolization must be for Defendants.

APPENDIX B

Civil Action No. 79-Z-1012

Defendants' Requested Jury Instruction No. 21

A monopolist who refuses to enter into a joint operating agreement with a competitor or who otherwise refuses to deal with a competitor in some manner, does not violate Section 2 if valid business reasons exist for that refusal. In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to be a monopolist in a relevant market, has not violated the law.

Mid-Texas Communications v. American Tel & Tel Co., 615 F.2d 1372, 1387 (5th Cir. 1980); *Byars v. Bluff City New* (sic) *Co., Inc.*, 609 F.2d 843 (6th Cir. 1979); *International Railways of Central America v. United Brands*, 532 F.2d 231 (2d Cir. 1976).

Office - Supreme Court, U.S.
FILED
NOV 2 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,
Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(*Counsel of Record*)
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
I. THE ISSUES PRESENTED FOR REVIEW DO NOT RAISE FACTUAL QUESTIONS	1
II. THE BRIEF IN OPPOSITION MISSTATES PETITIONER'S POSITION	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
Hecht v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)	6
Northeastern Tel. Co. v. *AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)	3
Stromberg v. *California*, 283 U.S. 359 (1931)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-510

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I. The Issues Presented For Review Do Not Raise Factual Questions

Respondent Aspen Highlands Skiing Corp. ("Highlands") argues that the three questions presented for review[1]—all of which relate to the imposition by the court of appeals of a legally enforceable duty on the part of horizontal competitors to cooperate—raise fac-

---

[1] Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit ("Petition" or "Pet.") i. "Pet. App." refers to the Appendix to the Petition. "Resp. Br." refers to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

tual questions, which would prevent this Court from reaching the main legal issue.[2] That is incorrect.

As the court of appeals recognized, the verdict here cannot stand if, as a matter of law, a leading firm has no duty to cooperate with an established rival to market their products jointly. The court summarized the six theories on which Highlands relied in closing argument. Pet. App. 12a. It then stated:

> Defendant challenges the first, second, fifth and sixth theories reasoning that their validity hinges on whether defendant had a duty to cooperate with plaintiff, and that as a matter of law no such duty could have existed . . . . We agree that the validity of the above four theories is premised on the theory of a duty to cooperate. And we agree that defendant has preserved the right to challenge the sufficiency of the evidence of this theory to support the verdict.

Pet. App. 14a. The court then spent nine pages considering whether petitioner Aspen Skiing Company ("Ski Co.") had a duty to cooperate with Highlands. Pet. App. 15a-23a. Although the court referred in general terms to Ski Co.'s "other conduct" (Pet. App. 15a, 23a), it nowhere analyzed that "other" conduct or suggested in any way that, by itself, it could support the verdict. There is no need for this Court to consider the other conduct: the verdict stands or falls on the existence of a duty to cooperate.

---

[2] In the court below, when Highlands was urging that the issue of the existence of a duty to cooperate could not be raised by a challenge to the sufficiency of the evidence, it contended, as the court of appeals put it, "that defendant's argument 'is largely a legal one.' " Pet. App. 13a.

It is settled law that where a jury has rendered a general verdict against a defendant and, due to the way the issues were framed for the jury, it is unclear whether the verdict was based on conduct that was unlawful or on conduct that was lawful, the verdict cannot stand. *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 94-95 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (antitrust case). *See also Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931).

Highlands cites what it contends are "a *series* of [five] exclusionary activities." Resp. Br. 13 (emphasis in original). The first four, however, are merely variations on the single theme of a duty to cooperate, and the last is of such insignificance as a matter of antitrust law that the court of appeals disregarded it.

The first "activity" is Ski Co.'s willingness to cooperate with respondent on terms respondent regards as unfair. That "activity," included as one of the six "theories" Highlands relied on below, was dealt with by both parties and also the court simply as evidence that Ski Co. did not want to reach agreement with Highlands on continued cooperation. Pet. App. 12a-14a; *see* p. 2, *supra*.

The second "exclusionary activit[y]" relied on is Ski Co.'s refusal to participate in Highlands' "Adventure Pack" scheme. The Adventure Pack was an attempt by Highlands to sell to the public, by itself, a combination of its own skiing services and Ski Co.'s. Ski Co. refused to cooperate with the plan: it refused to sell its own lift tickets to Highlands so that Highlands could re-sell them to the public unchanged but in a package with Highlands' own lift tickets, and it refused to accept coupons issued to the public by Highlands for use of

Ski Co.'s lifts. This alleged wrong is the same one complained of throughout: Ski Co.'s refusal to cooperate with Highlands in inducing the public to patronize Highlands as an adjunct to patronizing Ski Co.[3]

The third "activity" complained of—another of the "theories" dealt with below simply as evidence of unwillingness to cooperate (Pet. App. 12a-14a)—is Ski Co.'s increase in the price of its daily lift tickets; the increase made the Adventure Pack unprofitable for Highlands. Ordinarily, price *increases* are not predatory; it is *decreases* that are predatory. The usual effect of price increases is to drive patronage to one's competitors. Highlands' complaint about the price increase is merely a restatement of its theory of a duty to cooperate: that Ski Co. had a duty to cooperate by keeping its prices for lift tickets low enough so that Highlands could sell the tickets in a package that would yield a profit. The law imposes no such duty.

Fourth, Highlands contends that Ski Co. inconsistently refused to agree on a coupon system for a joint ticket with Highlands while it did agree to such

[3] Highlands argues that Ski Co.'s refusal to cooperate in the Adventure Pack makes this a vertical case because the lift tickets Highlands sought to buy from Ski Co. were an "input" for Highlands' Adventure Pack. Resp. Br. 20. The tickets, however, were not an input that Highlands would have transformed in any way in producing its own product or service. Ski Co. was not a wholesaler and was not in the business of selling lift tickets to other skiing firms. Highlands simply wanted to sell Ski Co.'s services in competition with Ski Co.'s own efforts to sell its own services. The Adventure Pack, therefore, adds no vertical element to this case: the relationship between Ski Co. and Highlands is purely horizontal.

a system with its competitor in another area, where circumstances were different. Highlands' argument apparently is that because Ski Co. entered into a coupon arrangement with others it had a duty to enter into one with Highlands. Thus, this fourth "activity" is merely a refusal by Ski Co. to cooperate. Ski Co. found disadvantageous (for whatever reason) and therefore refused to join in a business arrangement with Highlands of a kind that, in circumstances involving other parties, it found advantageous and did join. Under our free enterprise system—and the antitrust laws—business firms that enter into one joint venture have no legal obligation to enter into every other joint venture that may be proposed to them. Even the court below did not purport to rely on such a theory.

Finally, Highlands argues that Ski Co., when advertising its own three mountains, had a duty to advertise Highlands' as well. The very statement of the claim refutes it. Even the court of appeals did not attempt to rest the verdict on the fact that in some advertisements using a photograph of all four mountains in Aspen, Ski Co. identified only its own three mountains but not Highlands' mountain.

In sum, Highlands' dredging up of immaterial facts in an attempt to suggest that the issue of a duty to cooperate is not really presented by the case cannot obscure the plain fact that it is presented. The issue of a duty to cooperate (as reflected in the three questions stated at Pet. i) is squarely presented. The court of appeals treated it as the controlling issue, and decided the case on that basis. If *certiorari* is granted, this Court will have the same opportunity: at this stage of the case, there is no other ground for upholding or reversing the decision below.

II. The Brief In Opposition Misstates Petitioner's Position

Highlands contends that Ski Co. concedes that it had no business justification for its refusal to cooperate with Highlands. Resp. Br. 10 n.5, 24. That is incorrect. What Ski Co. concedes is that it had no business justification *other than a desire not to use its own resources to help an established competitor*. Ski Co.'s position was summed up by the trial testimony of one of its directors: "I am a businessman, and I have never understood why a businessman should help his competitor. I don't want to kill him, but I don't want to help him." Tr. 1533.

Highlands attributes to Ski Co. the position "that a refusal to cooperate could not constitute monopolization *under any circumstances*." Resp. Br. 9 (emphasis by respondent). Ski Co.'s position is, rather, that although there is a duty to deal in circumstances properly governed by the bottleneck doctrine and in certain other circumstances (*see* Pet. 6), none of those circumstances is present here.

Highlands attributes to Ski Co. the position that "for a facility to be essential it must be shown that if it were eliminated a plaintiff's entry or survival in the business would be impossible." Resp. Br. 18. Our view of the doctrine is somewhat broader than that—namely, that a facility is essential if, without it, a firm could not, as a practical matter, function in the market. See Pet. 12. The position we urge is not different in substance from that articulated in *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), cited in Resp. Br. 18 and Pet. 10 n.8.

Finally, Highlands points out that a joint marketing arrangement that would allocate to it less than its fair share of the revenues would "[take] away all incentive and ability for Highlands to compete to attract customers to its mountain." Resp. Br. 5; *see also id.* 13 ("a condition that fixed Highlands' share of the revenues at a level below what skier usage at Highlands would have justified and that stifled competition between the parties"). This very argument illustrates one of the fundamental vices of a legally enforceable duty to cooperate. If the division of revenues undercompensates Highlands, it impairs Highlands' incentive to spend resources to compete; but if it undercompensates Ski Co., it impairs Ski Co.'s incentive to compete. And here the parties could not agree on a mutually acceptable division of revenue. The incentives to compete are too sensitive for judicial administraton of a duty on the part of horizontal competitors to cooperate in joint marketing to the public.

CONCLUSION

For the foregoing reasons, together with those set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
STEVEN R. KUNEY
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner
November 1984

Office-Supreme Court, U.S.
FILED
JAN 24 1985
ALEXANDER L. STEVAS,
CLERK

(6)

No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
STEVEN R. KUNEY
MARK S. LEVINSTEIN
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000
Attorneys for Petitioner

TUCKER K. TRAUTMAN
(Counsel of Record)
JOHN H. EVANS
OWEN C. ROUSE
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway
Suite 2600
Denver, Colorado 80202
(303) 623-2700
Attorneys for Respondent

Petition for Writ of Certiorari filed on 9/28/84

Writ of Certiorari granted on 12/3/84

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

202 pp

TABLE OF CONTENTS

	Page
1. Chronological List Of Relevant Docket Entries	iii
2. Amended Complaint	1
3. Answer To Amended Complaint	12
4. Transcript Of Proceedings In The United States District Court For The District Of Colorado, June 1, 1981, To June 19, 1981	19
5. Plaintiff's Trial Exhibits	183
6. Defendants' Proposed Jury Instructions	185
7. Special Interrogatories To The Jury	187
8. Judgment Of The United States District Court For The District Of Colorado	191
9. Injunction	193

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit have been omitted in printing this appendix because they appear on the following pages of the appendix to the printed Petition for Certiorari:

Opinion, dated July 13, 1984 ..... 1a

Judgment, dated July 13, 1984 ..... 40a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

8/1/79--Complaint filed by Plaintiff Aspen Highlands Skiing Corporation in the United States District Court for the District of Colorado.

9/11/79—Answer of Defendants Aspen Skiing Corporation, Buttermilk Mountain Skiing Corporation, and Snowmass Skiing Corporation.

1/26/81—Amended Complaint filed.

3/11/81—Answer to Amended Complaint filed.

6/1/81—Jury trial commenced.

6/19/81—Verdict. Special Interrogatories to Jury. Judgment of the District Court entered.

7/15/81—Hearing on Motion for Entry of Permanent Injunction. Injunction order entered.

7/24/81—Minute Order denying Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial or, in the Alternative, to Alter or Amend the Judgment. Notice of Appeal by Defendants.

8/4/81—Written Injunction filed.

8/5/81—Notice of Cross-Appeal by Plaintiff.

1/28/82--Appeal and Cross-Appeal dismissed without prejudice by the United States Court of Appeals for the Tenth Circuit, because trial judgment not finalized by award of attorney's fees.

2/10/82—Judgment of the District Court, awarding attorney's fees. Judgment of 6/19/81 amended accordingly.

3/3/82—Minute Order denying Defendants' renewed Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial or, in the Alternative, to Alter or Amend the Judgment.

3/30/82—Notice of Appeal by Defendants.

4/2/82—Order substituting Aspen Skiing Company as a party in the action in place of Defendants Aspen Skiing Corporation, Buttermilk Mountain Skiing Corporation, and Snowmass Skiing Corporation.

4/5/82—Notice of Cross-Appeal by Plaintiff.

11/15/82—Appeal and Cross-Appeal submitted on briefs and oral argument to the United States Court of Appeals for the Tenth Circuit.

7/13/84—Opinion filed by the Court of Appeals. Judgment affirmed and remanded for determination of fees and costs.

7/31/84—Stay of Mandate until 9/2/84 pending application for certiorari.

8/28/84—Stay of Mandate until 10/2/84 pending application for certiorari.

9/28/84—Petition for writ of certiorari filed by Substituted Appellant and Cross-Appellee Aspen Skiing Company.

12/3/84—Writ of Certiorari granted by U.S. Supreme Court.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-Z-1012

ASPEN HIGHLANDS SKIING CORPORATION,
a Delaware corporation,

Plaintiff,

v.

ASPEN SKIING CORPORATION, a Delaware corporation,
BUTTERMILK MOUNTAIN SKIING CORPORATION,
a Colorado corporation and
SNOWMASS SKIING CORPORATION, a Colorado corporation,

Defendants.

AMENDED COMPLAINT

Plaintiff, by and through its attorneys Ireland, Stapleton & Pryor, P.C., for its amended complaint, alleges as follows:

JURISDICTION AND VENUE

1. This action is commenced under Section 4 of the Clayton Act (15 U.S.C. § 15) for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1,2) for damages resulting from such violations and for injunctive relief to prevent the continuation of such violations.

2. Jurisdiction of this court is founded upon 15 U.S.C. §§ 4 and 15 and 28 U.S.C. § 1337.

3. Each Defendant maintains an office, transacts business and is found in Colorado; most of the unlawful acts in connection with and pursuant to the combinations, agreements, conspiracies, or monopoly hereinafter described took place within Colorado; the illegal activities alleged herein had, and continue to have effects within Colorado, and the interstate trade and commerce described herein is partially carried on within Colorado.

PARTIES

4. Plaintiff Aspen Highlands Skiing Corporation ("Plaintiff" or "Aspen Highlands") is a corporation organized and existing under the laws of Delaware, with its principal place of business in Aspen, Colorado. It operates the Aspen Highlands Ski Area in Aspen, Colorado.

5. Defendant Aspen Skiing Corporation ("Ski Corp.") is a corporation organized and existing under the laws of Delaware, with its principal place of business in Aspen, Colorado. It operates the Aspen Mountain Ski Area in Aspen, Colorado. Since March of 1978, Defendant Aspen Skiing Corporation has been a wholly-owned subsidiary of Twentieth Century-Fox Film Corporation, a Delaware corporation.

6. Defendant Buttermilk Mountain Skiing Corporation ("Buttermilk") is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Aspen, Colorado. It is a wholly-owned subsidiary of Defendant Aspen Skiing Corporation, and operates the Buttermilk Mountain Ski Area at Aspen, Colorado.

7. Defendant Snowmass Skiing Corporation ("Snowmass") is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Aspen, Colorado. It is a wholly-owned subsidiary of Defendant Aspen Skiing Corporation, and operates the Snowmass Ski Area near Aspen, Colorado.

NATURE OF TRADE AND COMMERCE INVOLVED

8. Aspen Highlands, Ski Corp, Buttermilk and Snowmass are engaged in the business of providing downhill skiing services including, but not limited to, the sale of ski lift tickets and the provision of downhill skiing lessons, and related services.

9. In conducting these businesses Aspen Highlands, Ski Corp, Buttermilk and Snowmass and ARI substantially affect interstate commerce in the following ways:

(a) Each purchases materials and supplies necessary to conduct their business from outside the State of Colorado;

(b) each conducts advertising campaigns on a national basis to attract tourists from outside of the State of Colorado;

(c) a substantial number of the tourists purchasing such downhill skiing services travel from outside of the State of Colorado;

(d) a substantial portion of those tourists travel on commercial buslines, airlines, or other means of interstate transportation;

(e) each utilizes the United States mail as well as interstate telecommunications for the purpose of conducting its business;

(f) Aspen Highlands, Ski Corp, Buttermilk and Snowmass enter into commission agreements with tour operators located outside of the State of Colorado for the sale of their ski lift tickets and other downhill skiing services; and

(g) Aspen Highlands, Ski Corp., Buttermilk and Snowmass lease property from the United States Forest Service upon which portions of their downhill skiing facilities operate.

FACTUAL ALLEGATIONS

10. Downhill skiing in Aspen, Colorado is recognized by consumers of downhill skiing services as unique when compared to similar areas throughout the United States and even the world. The provision of downhill skiing services in Aspen, Colorado is a multi-million dollar business. Consumers of downhill skiing services who are temporarily or permanently located or residing in the area of Aspen,

Colorado, do not generally purchase such services outside of said area.

11. In providing downhill skiing services at Aspen Mountain, Buttermilk Mountain, and Snowmass Mountain, Ski Corp, Buttermilk and Snowmass control 80-85% of the downhill skier visits in the Aspen, Colorado area.

12. In providing downhill skiing services at Aspen Highlands, Plaintiff has only approximately 15% of the downhill skier visits in the Aspen, Colorado area.

13. Commencing in the early 1960's, Aspen Highlands, Ski Corp, Buttermilk and Snowmass cooperated in the provision of a joint reciprocal ticket plan ("joint four-area ticket") whereby the customer could buy tickets which would be honored by Ski Corp, Buttermilk, Snowmass and Aspen Highlands at all of their Aspen-area downhill skiing facilities. Said joint four-area ticket was offered by Ski Corp, Aspen Highlands, Buttermilk and Snowmass during the 1960's. In approximately 1972, Ski Corp, Aspen Highlands, Buttermilk and Snowmass again provided a joint four-area ticket which continued until 1974.

14. In February, 1974, Aspen Highlands, Ski Corp, Buttermilk and Snowmass entered into a joint venture agreement for the purposes, *inter alia*, of organizing Aspen Reservations, Inc. ("ARI"), a central reservation service for the Aspen, Colorado area, and for the marketing of a joint four-area ticket. Through the vehicle of ARI, Aspen Highlands, Ski Corp, Buttermilk and Snowmass continued to offer the joint four area ticket in the Aspen, Colorado area from 1974 through April of 1977.

15. On March 24, 1977, Aspen Highlands and Ski Corp sold their interest in ARI to Aspen In Advance, Inc. which continued operating the central reservation service in the Aspen, Colorado area.

16. Aspen Highlands, Ski Corp, Buttermilk and Snowmass continued to provide a joint four-area ticket in the

Aspen, Colorado area for the 1977-78 ski season. Ski Corp, Buttermilk and Snowmass also offered, for the first time, a three-area, six-day ticket which competed with the joint four-area ticket.

17. In May of 1978, Ski Corp, Buttermilk and Snowmass agreed and communicated to Aspen Highlands that they would not participate with Aspen Highlands in a joint four-area ticket unless the net revenues would be allocated on the basis of 12.5% to Aspen Highlands and 87.5% to Ski Corp and its subsidiaries. During the 1977-78 season, the revenues had been allocated on a basis of 15% to Aspen Highlands and 85% to Ski Corp and its subsidiaries. In all previous years in which the joint four-area ticket was offered by Ski Corp, Buttermilk, Snowmass and Aspen Highlands, the parties had agreed to divide revenues on the basis of actual usage at each area. For the 1974-75, 1975-76 and 1976-77 seasons, Aspen Highlands' share of those revenues ranged between 18.5% and 13.4%.

18. Upon information and belief, the agreement between and proposal by Ski Corp, Buttermilk and Snowmass to limit Aspen Highland's share of the revenues on the proposed four-area six-day ticket to 12.5% without regard to the actual usage at each area would artificially increase the market share of Ski Corp, Buttermilk and Snowmass for skier days and prevent Aspen Highlands from reasonably competing in the market.

19. As a result of the concerted refusal to deal with Aspen Highlands on a reasonable basis by Ski Corp, Buttermilk and Snowmass, there was no joint four-area ticket offered for the 1978-79 ski season. However, Ski Corp, Buttermilk and Snowmass again offered a three-area, six-day ticket for the 1978-79 ski season.

20. Upon this refusal to deal with Aspen Highlands by Ski Corp, Buttermilk and Snowmass, Aspen Highlands developed and offered its own four-area, six-day package known as Four Mountain Adventure Pack ("Highlands'

Adventure Pack") which provided the purchaser with three days downhill skiing at Aspen Highlands and with three coupons each with a value of $15.00. Said coupons were designed in such a way that they could either be redeemed for cash or exchanged for ski tickets for use at any of the four ski areas in the Aspen, Colorado area, including those controlled by Ski Corp. Highlands has offered a similar ticket for the 1979-80 and 1980-81 ski seasons.

21. Despite the fact that the Highlands' Adventure Pack would bring additional revenue to Ski Corp and its subsidiaries, Ski Corp, Buttermilk and Snowmass, in concert, refused to cooperate in promoting said ticket and in fact, during the 1978-80 ski season, refused to accept the coupons provided with that ticket when they were presented by skiers at Ski Corp mountains. Such a skier desiring to ski at Ski Corp mountains would first have to redeem the coupons for cash and then buy Ski Corp tickets with that cash.

22. In May of 1979, Aspen Highlands again requested that Ski Corp, Buttermilk and Snowmass participate with it in a joint four-area, six-day ticket with revenues to be allocated to reflect actual use at each area. Ski Corp, Buttermilk, and Snowmass, in concert, again refused to participate in the offering of such a joint four-area ticket and continued to offer a three-area, six-day lift ticket for the 1979-80 ski season.

23. For every ski season from 1978-79 until the present, the marketing strategy, and particularly the promotion of the three-area ticket, used by Ski Corp, Buttermilk and Snowmass has been designed to preclude, and, in fact, has precluded Aspen Highlands from a substantial portion of the market it enjoyed in the 1977-78 and prior ski seasons.

24. As a consequence of the conduct of Ski Corp, Buttermilk, and Snowmass as alleged herein, Aspen High-

lands has been substantially foreclosed from effective competition in a significant portion of the skiing market, consumer choices have been curtailed, and competition has been lessened.

FIRST CLAIM FOR RELIEF
(Sherman Act, §2—Monopolization)

25. Aspen Highlands incorporates the allegations contained in paragraphs 1 through 24 above as if set forth fully herein.

26. At all times relevant herein, Ski Corp and its subsidiaries have willfully acquired and/or maintained a monopoly in the sale of skiing services in the Aspen, Colorado area generally and in the sale of multi-area ski lift tickets in the Aspen, Colorado area specifically.

27. Ski Corp and its subsidiaries have improperly and illegally misused the monopoly power in violation of Section 2 of the Sherman Act by:

(a) Refusing to deal with Aspen Highlands in offering a joint four-area lift ticket whereby revenues are allocated on the basis of actual use by each area for the 1978-79 and subsequent ski seasons;

(b) refusing to deal with Aspen Highlands in regard to the promotion and operation of the Highlands Adventure Pack tickets for the 1978-79 and subsequent ski seasons;

(c) marketing its multi-day, multi-area tickets so as to induce ski customers in the Aspen area to deal exclusively with Ski Corp and its subsidiaries and thereby preclude Aspen Highlands from a substantial portion of the market it had previously enjoyed.

28. Upon information and belief, said conduct by Ski Corp, and its subsidiaries, outlined in paragraph 27 above, was carried out with the purpose and intent of foreclosing and eliminating Aspen Highlands from a substantial por-

tion of the downhill-skiing-services market and the multi-area lift ticket market in the Aspen, Colorado area.

29. As a consequence of the foregoing, Aspen Highlands has been damaged through loss of revenue and profits in its downhill skiing services business and through its added expenses in marketing and promoting its own four-area, six-day ticket without the cooperation of Ski Corp in an amount not yet determined.

30. Upon information and belief, said injury and damage will be recurring and ongoing for each ski season that a joint four-area ticket is not offered, leaving Aspen Highlands no adequate remedy of law and thereby making injunctive relief appropriate.

SECOND CLAIM FOR RELIEF
(Sherman Act, §2—Attempt to Monopolize)

31. Aspen Highlands incorporates the allegations contained in paragraphs 1 through 24, 27, 28, 29 and 30, as if set forth fully herein.

32. Ski Corp and its subsidiaries have attempted to monopolize the market for downhill skiing services and multi-area lift tickets in the Aspen, Colorado area creating a dangerous probability of success in achieving that monopoly in violation of Section 2 of the Sherman Act through the means set forth in paragraph 27 above.

33. Said conduct was carried out with the purpose and intent set forth in paragraph 28 above.

34. The foregoing has injured Aspen Highlands as set forth in paragraph 29 above.

35. The foregoing has left Aspen Highlands with no adequate remedy of law as set forth in paragraph 30 above.

THIRD CLAIM FOR RELIEF
(Sherman Act, §2—
Combination and/or Conspiracy to Monopolize)

36. Aspen Highlands incorporates the allegations contained in paragraphs 1 through 24, and 29 and 30 as if set forth fully herein.

37. Ski Corp, Buttermilk and Snowmass "have held themselves out" to the skiing public as independent competitors.

38. Ski Corp, Buttermilk and Snowmass and other unknown persons have combined and/or conspired to monopolize the sale of multi-area ski lift tickets in the Aspen, Colorado area in violation of Section 2 of the Sherman Act through their concerted actions of:

(a) Refusing to deal with Aspen Highlands in offering a joint four-area lift ticket whereby revenues are allocated on the basis of actual use of each area for the 1978-79 and subsequent ski seasons;

(b) refusing to deal with Aspen Highlands in regard to the promotion and operation of the Highlands Adventure Pack tickets for the 1978-79 and subsequent ski seasons;

(c) marketing its multi-day multi-area tickets so as to induce ski customers in the Aspen area to deal exclusively with Ski Corp. and its subsidiaries and thereby preclude Aspen Highlands from a substantial portion of the market it previously enjoyed.

39. Upon information and belief, said combination and/or conspiracy to monopolize the sale of downhill skiing services and multi-area ski lift tickets in the Aspen, Colorado area was carried out with the purpose and intent of foreclosing and eliminating Aspen Highlands from a substantial portion of the downhill-skiing-services market and the multi-area lift ticket market in the Aspen, Colorado area, and of monopolizing said market.

40. The foregoing has injured Aspen Highlands as set forth in paragraph 29 above.

41. The foregoing has left Aspen Highlands with no adequate remedy of law as set forth in paragraph 30 above.

FOURTH CLAIM FOR RELIEF
(Sherman Act, §1—Restraints of Trade)

42. Aspen Highlands incorporates the allegations contained in paragraphs 1 through 24, 27, 29 and 30, as if set forth fully herein.

41. Ski Corp, Buttermilk and Snowmass have entered into contracts, combinations, and/or conspiracies with each other and with other unknown persons resulting in restraints of trade in violation of Section 1 of the Sherman Act as more specifically alleged in paragraph 27 above.

42. The foregoing has injured Aspen Highlands as set forth in paragraph 29 above.

43. The foregoing has left Aspen Highlands with no adequate remedy of law as set forth in paragraph 30 above.

WHEREFORE, Plaintiff requests the following relief:

1. That this court enter judgment against Ski Corp, Buttermilk and Snowmass jointly and severally, and in favor of Aspen Highlands for damages in an amount not yet determined resulting from Defendants' violations of the Sherman Act. Insofar as damages incurred as a result of Defendants violations may continue during the time of this litigation, Plaintiff requests that it also be awarded the amount of those damages.

2. That the court award interest on all damages from the date of accrual thereof and treble the amount of all damages and award Plaintiff its litigation costs and fees and reasonable attorney's fees, pursuant to Section 4 of the Clayton Act.

3. That this court grant injunctive relief against Ski Corp for its violations of the Sherman Act as follows:

(a) Require Ski Corp to divest two out of its current three downhill skiing facilities in Aspen, Colorado area;

(b) permanently enjoin Ski Corp, Buttermilk and Snowmass and their affiliates, and their officers, agents, servants, employees, and attorneys and all other persons or entities in active concert or participation with them from refusing to participate with Plaintiff in the provision of a joint four-area ski lift ticket whereby revenues are allocated based upon actual usage at each area.

4. That the court grant such other and further relief as it deems just and proper.

PLAINTIFF HEREBY DEMANDS A JURY TRIAL.

Dated: January 26, 1981.

IRELAND, STAPLETON & PRYOR, P.C.
TUCKER K. TRAUTMAN
JOHN H. EVANS

/s/ By TUCKER K. TRAUTMAN
Attorneys for Plaintiff
Aspen Highlands Skiing Corporation
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

[Certificate of service omitted in printing]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-Z-1012

ASPEN HIGHLANDS SKIING CORPORATION,
a Delaware corporation,

Plaintiff,

vs.

ASPEN SKIING CORPORATION, a Delaware corporation, *et al.*,

Defendants.

ANSWER TO AMENDED COMPLAINT

Defendants Aspen Skiing Corporation, Buttermilk Mountain Skiing Corporation and Snowmass Skiing Corporation (hereinafter "ASC"), by their attorneys Holland & Hart, answer plaintiff's amended complaint herein as follows:

1. ASC admits that this action purports to have been commenced pursuant to the statutes cited by paragraph one of the amended complaint, but otherwise denies the allegations of said paragraph.

2. ASC denies the allegations contained in paragraph two of the amended complaint.

3. ASC admits that it maintains offices and transacts business in Colorado, and denies every other allegation contained in paragraph three of the amended complaint.

4. ASC admits the allegations contained in paragraph four of the amended complaint.

5. ASC admits the allegations contained in paragraph five of the amended complaint.

6. ASC admits the allegations contained in paragraph six of the amended complaint.

7. ASC admits the allegations contained in paragraph seven of the amended complaint.

8. ASC admits the allegations contained in paragraph eight of the amended complaint.

9. ASC admits that its business operations utilize instrumentalities of interstate commerce, including advertising media, mail and modes of interstate travel, admits that a substantial number of persons who utilize skiing facilities in Aspen travel from outside the State of Colorado, and admits that portions of its skiing facilities are on land which is leased pursuant to United States Forest Service permits, but otherwise denies the allegations of paragraph nine of the amended complaint.

10. ASC denies the allegations contained in paragraph ten of the amended complaint.

11. ASC denies the allegations contained in paragraph eleven of the amended complaint.

12. ASC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twelve of the amended complaint, and therefore denies same.

13. ASC admits that in certain years during the 1960's coupons were available and were accepted by it in exchange for ski lift tickets, but otherwise denies the allegations of paragraph thirteen of the amended complaint.

14. ASC admits that it entered into a joint venture with plaintiff in 1974 for the purpose of organizing ARI, and that a joint four-area ticket was offered through ARI during the period from 1974 to 1977, but otherwise denies the allegations of paragraph fourteen of the amended complaint.

15. ASC admits the allegations contained in paragraph fifteen of the amended complaint.

16. ASC admits that a four-area ticket was offered in the Aspen area during the 1977-1978 skiing season, and that ASC also offered a three-area, six-day ticket during that

season, but denies the remaining allegations of paragraph sixteen of the amended complaint.

17. In response to paragraph seventeen of the amended complaint, ASC admits that in 1977-78 revenues from the sale of the four-area ticket had been allocated 15% to Aspen Highlands and 85% to ASC, and that in previous years other methods of revenue allocation had been used. ASC otherwise denies the allegations of paragraph seventeen.

18. ASC denies the allegations contained in paragraph eighteen of the amended complaint.

19. ASC denies the allegations contained in paragraph nineteen of the amended complaint.

20. ASC is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph twenty of the amended complaint, and therefore denies same.

21. ASC admits that it refused to act as a redemption center for Highlands' Adventure Pack coupons or to accept such coupons in lieu of payment for lift tickets, but otherwise denies the allegations of paragraph twenty-one of the amended complaint.

22. ASC denies the allegations contained in paragraph twenty-two of the amended complaint.

23. ASC denies the allegations contained in paragraph twenty-three of the amended complaint.

24. ASC denies the allegations contained in paragraph twenty-four of the amended complaint.

25. In response to paragraph twenty-five of the amended complaint, ASC incorporates its responses to paragraphs 1-24 as set forth above.

26. ASC denies the allegations contained in paragraph twenty six of the amended complaint.

27. ASC denies the allegations contained in paragraph twenty-seven of the amended complaint.

28. ASC denies the allegations contained in paragraph twenty-eight of the amended complaint.

29. ASC denies the allegations contained in paragraph twenty-nine of the amended complaint.

30. ASC denies the allegations contained in paragraph thirty of the amended complaint.

31. In response to paragraph thirty-one of the amended complaint, ASC incorporates its responses to paragraphs 1-24 and 27-30 as set forth above.

32. ASC denies the allegations contained in paragraph thirty-two of the amended complaint.

33. ASC denies the allegations contained in paragraph thirty-three of the amended complaint.

34. ASC denies the allegations contained in paragraph thirty-four of the amended complaint.

35. ASC denies the allegations contained in paragraph thirty-five of the amended complaint.

36. In response to paragraph thirty-six of the amended complaint, ASC incorporates its responses to paragraphs 1-24 and 29-30 as set forth above.

37. ASC denies the allegations contained in paragraph thirty-seven of the amended complaint.

38. ASC denies the allegations contained in paragraph thirty-eight of the amended complaint.

39. ASC denies the allegations contained in paragraph thirty-nine of the amended complaint.

40. ASC denies the allegations contained in paragraph forty of the amended complaint.

41. ASC denies the allegations contained in paragraph forty-one of the amended complaint.

42. In response to paragraph forty-two of the amended complaint, ASC incorporates its responses to paragraphs 1-24, 27, and 29-30 as set forth above.

41(A). ASC denies the allegations contained in paragraph forty-one (A) of the amended complaint.

42(A). ASC denies the allegations contained in paragraph forty-two (A) of the amended complaint.

43. ASC denies the allegations contained in paragraph forty-three of the amended complaint.

FIRST AND SEPARATE DEFENSE

The amended complaint fails to state a claim or cause of action upon which relief can be granted.

SECOND AND SEPARATE DEFENSE

While continuing to deny the material allegations of plaintiff's amended complaint, ASC asserts that any actions by it which could be deemed relevant to said amended complaint were legal, reasonable and did not constitute unreasonable restraints of trade in violation of any statute.

THIRD AND SEPARATE DEFENSE

Plaintiff has not been injured within the meaning of 15 U.S.A. § 15.

FOURTH AND SEPARATE DEFENSE

While continuing to deny the material allegations of plaintiff's amended complaint, ASC asserts that any of its actions relating to ski area operations, pricing, variety of lift tickets and any other actions alleged by the amended complaint were approved, authorized or required by valid regulations and orders of the Secretary of Agriculture of the United States, or other governmental entities.

FIFTH AND SEPARATE DEFENSE

While continuing to deny the material allegations of plaintiff's amended complaint, ASC asserts that the Court lacks jurisdiction herein on the ground that the United States Department of Agriculture and the United States Forest Service are vested with primary jurisdiction over the subject matter of this action.

SIXTH AND SEPARATE DEFENSE

While continuing to deny the material allegations of plaintiff's amended complaint, ASC asserts that said amended complaint should be dismissed for failure to join the United States Department of Agriculture and the Secretary of the Department of Agriculture, indispensable parties to this action.

SEVENTH AND SEPARATE DEFENSE

Plaintiff's claims are barred in whole or in part by the applicable statute of limitations, 15 U.S.C. § 4B.

WHEREFORE ASC prays that this action and plaintiff's amended complaint herein be dismissed, and that ASC be awarded judgment against plaintiff together with its attorneys' fees, expert witness fees and costs expended herein and such further relief as the Court may deem appropriate.

HOLLAND & HART

/s/ By DAVID G. PALMER
DAVID G. PALMER
WILLIAM W. MAYWHORT
Post Office Box 8749
Denver, Colorado 80201
(303)575-8000

Attorneys for Defendants
Aspen Skiing Corporation,
Buttermilk Mountain Skiing
Corporation and Snowmass
Skiing Corporation

[Certificate of service omitted in printing]

TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, JUNE 1, 1981, TO JUNE 19, 1981

• • •

Testimony of Whipple V.N. Jones

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[150] Q. Okay. Could you tell the jury how you ended up starting Aspen Highlands?

A. I started Aspen Highlands as a result of the Forest Service telling me that Aspen Mountain was getting crowded and they thought that a ski area ought to be started at Highlands; and so I hired Friedl Pfeiffer and Dick Durns to make a feasibility report to me on the feasibility of a ski area at Highlands. The report was favorable, and I took it over to Willie Hodges, who was the President of the Aspen Skiing Corporation, and Ed Garston, who was their Secretary. We had a meeting at my house, and I told them that the Forest Service suggested we have a ski area at Highlands. Willie Hodges, who was the original President of Aspen Skiing Corporation, and who was the President before D.R.C. Brown—D.R.C. came on in about '62 or '63—Willie Hodges said, "We've got plenty of problems [151] at Aspen now, and we don't think we want to expand skiing in Aspen."

Q. Did you own the land at Highlands?

A. Yes. I owned the base area.

Q. What did you do after your meeting with Mr. Hodges?

A. Well, I thought about what I should do with these feasibility reports, and they looked pretty good to me; so I decided to build the area myself.

Q. What facilities did you first construct at Aspen Highlands?

A. I first constructed Exhibition Lift, which went from the 8,000-foot level to about 10,000-foot level; and then I constructed Thunderbowl Lift, which went from another part of the mountain from the 8,000-foot level to about the 9,000-foot level. I then put in a T-bar, which had about 400 feet of vertical and built a base lodge with a restaurant at the bottom and a ski shop at the bottom and a rather large parking area at the bottom.

Q. Could you describe for the jury the physical characteristics of the mount in itself to make it appropriate to have a ski area there?

A. Yes. Aspen Highlands is—well, Mother Nature endowed it with just about the right slopes. We are 25 percent a beginner area, 50 percent an intermediate area, and 25 percent an advanced area. It faces north, and there is very little wind [152] on the mountain. It is an ideal mountain.

Q. You said that Aspen Highlands opened in approximately 1958. Is that right?

A. '58-'59 was our first winter.

Q. When did Buttermilk open?

A. Buttermilk opened the same year.

Q. Could you describe who developed Buttermilk Mountain?

A. Yes. Arthur Pfister and Friedl Pfeiffer developed Buttermilk Mountain. They each owned part of the base area of the mountain.

Q. Who are those gentlemen?

A. Friedl Pfeiffer came from St. Anton, Austria, and had been an Olympic skier—a fine skier—and was head of

the Aspen Skiing Corporation Ski School; and Art Pfister was a rancher.

Q. I see. Now, as of 1958, then, there was the Aspen Skiing Corporation Mountain, Aspen Mountain; the Highlands; and Buttermilk. Is that right?

A. Yes.

Q. Now, could you generally tell the jury what types of lift tickets the various areas offered in the late 50's?

A. Well, they offered a daily ticket and a half-daily ticket and a child's ticket.

Q. Were there any interchangeable, multi-day tickets when you got started?

[153] A. No, not at that time.

Q. Now, was there a multi-interchangeable lift ticket offered after 1958 at some point?

A. Yes, there was.

Q. Could you describe how that ticket developed?

A. One day Friedl Pfeiffer called [illegible] and said, "I'd like to have lunch with you and D.R.C.," and we went over to the Red Onion and had lunch. He said, "In St. Anton, we have a mountain that has three different lift companies—lifts owned by three different lift companies." He said, "We sell a ticket that is interchangeable." It was good on any of those lifts; and he said, "I think we should do the same thing here. We would have a ticket that would be good at Aspen Mountain and one at Highlands and one at Buttermilk."

So we thought about it and worked out a way with Ralph Melville, who was in the Chamber of Commerce; and we issued a six-day ticket which was composed of six coupons. Those coupons were purchased from the bank by each individual ski area. We sold those six coupons to our customers; and then when the customer used the coupon,

he exchanged it for a daily lift ticket at Buttermilk or at Ajax, which is Aspen Mountain, or at Aspen Highlands.

We took that coupon and sent it in to the bank with our daily receipts, and we received our money on a usage basis.

Q. Okay. Now, could you tell me why it was decided to [154] divide the revenue up on the basis of usage rather than some arbitrary fixed percentage?

A. Well, it seemed to us that that was the fair way to do it. When you have a skier come to your area and he makes moguls or he uses your snow and uses your lifts, you should be reimbursed for that. This method reimbursed us that way.

Furthermore, it allowed us to compete with the other areas. For instance, it allowed Highlands to compete with the other two areas to get more skiers there. We innovated certain ideas and tried to get additional skiers there.

Q. Would you tell the jury what kinds of things during this period of time—we are now, I take it, into the 60's—what kinds of things were done at the Highlands to try to get skiers to come to your mountain rather than go to Ajax or to Buttermilk

A. Well, we're 1½ miles from the center of Aspen; and most of the lodging is in Aspen. We soon found out that it was necessary to have a bus system to bring people out to Aspen Highlands. We at first hired the manger of the Glenwood-Aspen Stages to bring people to Aspen Highlands. We paid him a quarter a customer, and it worked out pretty well.

Then we finally bought buses, and I think we ended up with a fleet of about 10 buses now that go into town and bring people out to Highlands. That was one of the things we did.

Q. Let me ask you a question about that before we [155] continue. Was the skier charged for the bus transportation?

A. Oh, no. There was no charge to the skier. We did that ourselves.

Q. What other items did you develop?

A. Well, we really were very fortunate in getting topnotch people when we started Aspen Highlands. We hired Stein Erikson, who was the Olympic champion in the 40's. He was a Gold Star Medal winner there, and we also hired Peter Seibert. Peter Seibert was our General Manager the first year, and Peter Seibert started Vail and is the founding father of Vail.

Peter and Stein Erikson laid out all our trails, and we were very fortunate to have them both with us.

In order to get more people out there, we had Stein doing—we called it "Stein's Flip," and he did a forward somersault in a layout position. It still is one of the best layouts that anybody does. We used to have him on Sunday afternoons do that sort of thing.

* * *

[158] Q. What is the significance of a Forest Service permit for a ski area?

A. The Forest Service permit allows you to lease the area of Forest Service land on the mountain for approximately [159] 30 years.

Q. Can you operate a ski area on Forest Service land without such a permit?

A. No.

* * *

Q. Okay. Now, during those years—excuse me—you have mentioned the acquisition of the Buttermilk area by Aspen Skiing Corporation and the acquisition of the permit of Mr. Jans. Were there ever any instances in the 60's when you were approached by the Aspen Skiing Corporation?

A. Yes. Paul and Peter Nitze came over to see me in the early 60's and asked me if I wanted to sell Aspen Highlands to them. I said, "Well, I might, if I get the right price; but why do you want to buy Aspen Highlands? You already have Aspen Mountain."

He said, "Well, what we want to control is skiing in Aspen."

* * *

[161] Q. Now, are you familiar with an organization known as Aspen Reservations, Inc.?

A. Yes, I am.

Q. Could you describe how that organization originated?

A. Aspen Reservations, Inc., was initiated by Bill [162] Brehmer, who was our Marketing Director in the early 70's. It was his idea to have a well-run, central reservation service and to have that service market package plans. He had the idea that the package plan should be a four-area, six-day ticket; that it would be sold by tour operators and travel agents; and ARI would be the leading organization marketing those packages.

* * *

Q. You mentioned that the idea for this Aspen Reservations was Mr. Brehmer's. He was your Marketing Director. Could you explain the difference in the four-area ticket that was offered as part of this venture with what was offered previously in the 60's?

A. The fundamental difference was that we had a [163] convenience package for the customer, in that he had the ticket on a strap around his neck—a string around his neck. When he went through the lift line at any particular area, it was punched. That gave us a credit for his use of the area at that time, because we made a survey and we counted the number of people, for instance, that

went up on our lift that day who had this kind of a ticket; where as in the coupon system, the coupon itself was evidence of the count.

Q. Now, was this ticket sold at the multiple of the daily lift ticket? In other words, if it was a six-day ticket, was it just six times whatever the individual daily lift ticket was?

A. No. It was sold at a small discount, usually around 5 percent or something like that.

Q. Now, did this ticket require the customer to ski any of the areas for a fixed number of days?

A. No. You could ski anywhere you wanted to in the Aspen area on this ticket.

* * *

[164] Q. Let me ask you: Why was a survey used for this particular ticket?

A. Well, it was the only way that we could figure out with this kind of a ticket around their neck that we could determine the usage at each ski area; and that's what the survey did.

Q. Why was usage chosen as the method of allocating?

A. Well, it seemed to us to be the only fair way of allocating revenues.

Q. You mentioned previously that you were attempting to get people to come to your mountain in the 60's. In the 70's, [165] when this ticket was inaugurated, can you tell me were there any other items that you did at your mountain to attempt to get people to come there once they arrived in Aspen for their vacation?

A. Yes, we did. We initiated picnics, wine and cheese party at Cloud 9, which is two-thirds of the way up our mountain; and we, for groups of 20—we offered this gratis to our customers.

We also, on Fridays initiated a series of acrobatic skiers coming down in front of the—our midway restaurant, which we called the Merry-Go-Round. We also instituted ski patrol jumps over our sun deck at Cloud 9. All these items contributed to a fun atmosphere at Highlands.

Q. Did you have racing at Highlands?

A. Yes, we had—we were the first ski area in Aspen to start NASTAR.

* * *

Q. Now, did Aspen Highlands develop a ski school?

A. We were the first people in Aspen to develop the [166] GLM method of instruction; and we still use it and we are still the only ski area in Aspen to use the GLM method of instruction. It's been very successful.

Q. Could you tell the jury what GLM stands for?

A. GLM means Graduated Length Method of Skiing. It's a short ski. You start your beginning skier on a roughly—a two-foot ski, and then after a day or so he gets to a three-foot ski and then to a four-foot ski; and that's why it's called the Graduated Length Method. We guarantee that any skier will get his money back if he can't ski from midway down within three days' time.

In the old days, a long ski used to take you six weeks to learn to ski; but now we can do it in three days.

* * *

Q. Do you know what your revenue percentages were for the '73-'74 season through the '76-'77 season?

A. I don't know them offhand, but I have a note in my pocket which will tell me what they are, if I may look at my note.

Q. I think you can do that.

A. All right.

Q. As long as there is nothing else on it. Go ahead [167] and just refer to it—just refer to it.

A. In '73-'74, our percentage was 17½ percent. In '74-'75, our percentage was 18½ percent. In '75-'76, it was 16.8 percent. In '76-'77—that's a no-snow year—it was 13.2 percent.

Q. Now, Mr. Jones, why did your percentage drop in the '76-'77 year?

A. That year—we have always made a point of opening Aspen Highlands on Thanksgiving Day; and that year our snow was very light, but we opened and we didn't get the snow that we expected to have. We sort of skied out our snow.

Aspen Mountain didn't open until January 8th that year, and they had a pretty good storm right about that time, and the storm helped them and didn't help us very much; so our percentage went down because of the fact that we opened prior to the time that they did.

* * *

[168] Q. Mr. Jones, why was this joint venture that operated the central reservations in Aspen and also operated this four-area ticket sold?

A. It was sold primarily because we felt that we should be in the business of lifting people up the mountain and having them ski down our mountain rather than being in the reservation service.

Secondly, the lodges felt that the ski corporation owning Aspen Reservations might show some partiality in reservations and so forth, and they felt that they should run it.

Thirdly, the Attorney General felt that because we owned this jointly there was a chance that we might be discussing pricing of tickets and so forth. They alleged

that; but of course we didn't do that through it, so this offer came along and we sold it.

* * *

[169] Q. Could you briefly tell the jury what a ski package is?

A. A ski package is usually a reservation to stay in Aspen, plus the ski tickets to ride the lifts in Aspen. Sometimes it may include rental skis, and sometimes it may include [170] an air ticket from St. Louis to Denver and from Denver to Aspen; but usually it's—The part that we are concerned with is mainly the ski lift ticket and the reservation in Aspen.

* * *

[172] Q. Okay. Can you tell the jury why Aspen Highlands accepted a fixed percentage of 15 percent in the '77-'78 season?

A. Mr. Wentzel, who is our Financial Vice President, had corresponded with people over in Aspen Skiing Corporation, and they offered him 13.2 percent as a fixed percentage break for us. He wrote back and said that that was not fair. They negotiated 15 percent fixed price participation for us.

When I say, "fixed price," I mean we wouldn't get any credit at all for any additional people we brought to our mountain; but talking it over, why it developed that we wouldn't have had a four-area ticket unless we had accepted that 15 percent.

Q. Now, did Aspen Skiing Corporation mountains offer another multi-day ticket, multi-area ticket in the '77-'78 ski [173] season?

A. Yes. They offered a six-day, three-area ticket. That means when you bought that ticket you could ski Aspen

Mountain, Buttermilk, and Snowmass; but you could not ski Aspen Highlands.

* * *

[187] Q. Could you tell the jury what the substance of that discussion was?

A. We had some coffee and discussed this letter, and I went over it with him and told him that I thought it was very unfair to have a fixed percentage allocated to Aspen Highlands and that we probably would not be able to go along with his suggestion because the 12½ percent was way below our historical average; and we also felt that we were unable to compete for customers because we had this fixed percentage allocated to us.

[188] Q. Mr. Jones did you talk about any other methods of allocating revenue on the basis of usage?

A. Yes. We had a usage basis, which we wanted to have and thought very necessary. I said that we would use coupons or we would use a survey at our area by an independent auditor—somebody like Price Waterhouse—somebody like that—and also if there were an electronic device available to count customers, we would use that.

We tried, oh, 10 or 15 years ago to get electronic devices to count customers, but we were never able to get IBM or NCR interested in it.

Q. Now, with respect to a coupon arrangement, what did you have in mind in those discussions?

A. The coupon arrangement was very similar to the one we had in the 60's and the one that is being used at Ski the Summit by Aspen Skiing Corporation.

Q. What is Ski the Summit?

A. Ski the Summit are four mountains in the Front Range: Breckenridge, Copper Mountain, Keystone, and Arapahoe. They use the coupon system to divide their revenues.

Q. Did Mr. Brown respond to the idea of using coupons as used in the 60's or at Ski the Summit?

A. He was very adamant that they did not want to have any surveys at all, nor did they want to use coupons. He said, "This is it, and I'm not going to change it."

* * *

[192] Q. Okay. Now, Mr. Jones, could you tell the jury why you were unwilling to accept a 12½ fixed percentage in the '78-'79 season where as you agreed to a 15 percent fixed percentage the year before?

A. The year before we agreed to a fixed percentage [193] because we wanted to keep our four-area ticket in operation, and we felt that if we didn't agree to that there would be no more four-area ticket. But we also at that time felt that we would be able to convince the Aspen Skiing Corporation during that period that we should have a cut of the gross revenues based on usage rather than a fixed percentage. We have always felt that a usage basis is the fair way to handle it, and also it results in each area competing to get more customers for each area. In doing so, why the consumer benefits from that.

We also felt that in the year they offered this 12½ percent very firmly and said this is it or else that we could see the handwriting on the wall. The next year, they were probably going to say, "We will offer you 10 percent," and so forth, or maybe even lower than that. We just felt that it was not a fair offer to us.

* * *

[197] Q. Mr. Jones, this lawsuit was brought shortly thereafter. Can you tell the jury why you brought the lawsuit?

A. I brought this lawsuit because we have a fine mountain. We developed it with the best equipment available.

Our mountain uses the same kind of lifts made by Riblet Tramway Company that Aspen Mountain uses. We had brought in top-notch people: Peter Seibert, who established Vail; Stein Erikson, who was a gold medalist Olympic champion. We built up a fine management group at Aspen Highlands. Our mountain manager as a boy dug holes for our original towers to be set in place. He's been with us some 23 years.

During this period, we put into effect a four-area ticket that was based on usage, and it became very successful—so successful, in fact, that the Aspen Skiing Corporation used the same kind of ticket to apply to their three-area ticket and cut us out of that—of participating in the four-area ticket. We were severely damaged by them locking us out of that type of ticket, and that's why I brought the suit.

* * *

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[209] Q. Aspen Highlands has a budget, for example, for media advertising, magazines, newspapers, things of that nature?

A. The Marketing Department does.

Q. Yes. The Marketing Department of Aspen Highlands?

A. Yes.

Q. And as I understand it, you advertise in various national and regional magazines, such as the skiing magazines [210] and airline magazines—things of that nature?

A. Very little in national magazines, but our advertising is mostly—our dollars are spent mostly in Aspen.

Q. You do advertise in nationally circulated magazines, don't you?

A. I don't think we did last year, but the Marketing Department would have to give you that answer.

Q. In years prior to last year, did you?

A. Occasionally.

• • •

[212] Q. Okay. It is also true, Mr. Jones, that you send representatives to ski shows in Mexico, for example?

A. One year we did.

• • •

[213] Q. Okay. The skiers who are drawn to Aspen—would you agree with me—are a relatively mobile and relatively affluent segment of society?

A. Yes.

• • •

Testimony of James Wentzel

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[267] Q. Did you have any discussions with Mr. Sullivan concerning contingency plans, if you will, by the Aspen Highlands to market other kinds of multi-area tickets?

A. Yes, I did. I believe my letter reflects that again that when I was made aware of this by Mr. Sullivan that they were going to do their own three-area ticket that that caused me concern and that we—and I think I indicated to Mr. Sullivan that we may have to do some kind of our own four-area, six-day ticket of our own. We'd have to come up with something innovative, because we felt the four-area capability was very important to us, to the resort of Aspen.

[268] Q. I am not following you here, Mr. Wentzel. At this time, did you know whether there would be a four-area ticket or not, in '77-'78—a joint four-area ticket?

A. At this time, based on this phone call, I was very doubtful that there was going to be a joint four-area ticket.

Q. All right. When you were now talking about a four-area ticket, you were talking about one that would be offered by Highlands. Is that right?

A. Right. What I am saying is that it didn't look to me very good that the Aspen Skiing Corporation was going to participate with us in allowing us to have a four-area ticket with them; and what I was saying is that we may have to put something together quickly—Aspen Highlands ski area—to have a four-area ticket.

Q. What did you tell Mr. Sullivan about putting something together with Aspen Highlands in the nature of a four-area ticket?

A. As the memo reflects, I indicated in that conversation that if they took that approach of having only a three-area ticket and not a four-area ticket with us that we may have to do something on our own; and I asked Mr. Sullivan if they would be willing to assist us in still providing the consumer with a four-area ticket by allowing us to issue vouchers along with our daily tickets that the consumer could bring over there to their window and exchange for one of their daily tickets, or [269] would the Aspen Skiing Corporation be willing to sell us, for instance, if Highlands was going to have three days of skiing at Highlands and want to give them three days skiing at the Aspen Skiing Corporation—would the Aspen Skiing Corporation sell us their three-day ticket—three-area, three-day ticket in bulk, in advance, so we could combine a package, or would they sell us their daily tickets in advance in bulk.

The memo reflects Mr. Sullivan said no, they would not be willing to do that, because they would not be willing to help out in a competitive situation like that.

• • •

[271] Q. Why did you feel that 13.2 percent was not representative, as you testified?

A. I didn't feel 13.2 was representative at all because 13.2, while it was our percentage in the '76-'77 season, the '76-'77 season was a very unreflective year of anything, because it was a no-snow year. Aspen Highlands, as was previously testified, got the reputation of being skied off because we made an effort to open at Thanksgiving, and there was a wide reputation that our snow was skied off. Perhaps, I feel, that had a bearing on our skier days.

• • •

Testimony of William Comstock

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[309] Q. Could you describe in 1976-'77, the no-snow year, which would have been your first season in this position, first of all what types of tickets were offered by the various Aspen mountains?

[310] A. The major ticket that was offered, or the primary ticket as far as the guest was concerned, was the four-area ticket sponsored by the two corporations through the vehicle known as Aspen Reservations.

• • •

Q. You mentioned that the ARI joint venture existed during that period of time. Were they involved in marketing efforts on behalf of the Aspen resort?

A. In 1976 and '77, ARI did do, to my recollection—I was not directly involved with them, but they did do national marketing, yes.

Q. And how was that funded—that marketing?

A. It is my understanding it was supported jointly by the two ski corporations, and it was based on some formula relative to the utilization of the four-area ticket by the guest.

Q. Now, did you also on behalf of the Aspen Highlands do national advertising or national promoting—national marketing?

A. In 1977, or 1976-'77, I did not do any national advertising, but we did do some promotional work.

[311] Q. Could you describe what that national promotional work was?

A. Yes. We organized a tour, which was a coast-to-coast promotional tour, where I visited most of the major tour operators, travel agents, ski clubs, and airline reservation centers that we did business with and simply promoted Aspen at large.

By the way, I've always had the philosophy that what you do is you promote Aspen. We sell one product when you are on the road on a national basis, and that is Aspen.

Q. Why is that?

A. It is the only product that the guest identifies with in Pittsburgh, for instance.

Q. Okay.

A. He's anxious to get there, but he doesn't make a differentiation between anything at Aspen. It is Aspen, and it is a package—a singular package.

Q. During '76-'77, did you do any advertising, promotion, or marketing in the local market—the Aspen area?

A. Yes. There was some done by the Aspen Highlands.

Q. Could you describe first of all what is the purpose of that advertising or that promotion?

A. It is to improve the guest attendance at the Aspen Highlands, and I would refer to it as improved market share.

Q. Once the people got to Aspen?

[312] A. Yes.

Q. Could you tell me what kinds of media or devices that you would use to attempt to do that?

A. It was primarily—it would have been on the radio, the Aspen Times, and then there is a free handout newspaper called the Aspen Flyer. Those would have been the primary entries.

Q. And what was it about Aspen Highlands that you promoted to try to get people to come to your mountain rather than going to Buttermilk or Ajax or Snowmass?

A. At that time—and I still feel it's true—that the primary attraction was the ski school, what we offered in the ski school as far as the person coming there. It gave them an opportunity to really have an enjoyable experience in Aspen right off the bat. They didn't have to go home with numerous bruises and contusions and twisted legs and all of those other things.

Then in addition to that, we tried to give them almost a three-ring circus experience of many different things that were going on. We had a NASTAR event, which I believe was run two days or so out of the week. We had race events running anywhere from major pro races to local types of races. We had free-style contests. We had the Ski Patrol hurdling over the ski deck. We had wine picnics—wine and cheese picnics for groups that were visiting us.

[313] Those are things that come to mind right now.

* * *

Q. We were talking about local promotions. Did you ever visit the airports or do anything of that nature to try to get [314] people to come to your mountain?

A. In that year we did have a program that I instituted in going down to the airport here in Denver, coming down to the airport here in Denver. As you have been apprised, it was a year when the snow conditions were rather marginal, and we were getting some very bad publicity over the country. The guests were cancelling, and the people who were arriving came with a certain amount of hesitation and wondered if they had made a good decision; so I proposed a program that started with my wife and I coming down here. We were dressed in identity clothing to meet the guests at the Aspen Airport (sic), as they would be waiting to board a plane to come to Aspen, assuring them that they had made a good decision in coming to the area and that they would have an enjoyable time and that their expectations would be met.

Q. Did you ever meet people at lodges or condominiums?

A. I wasn't directly involved in doing that myself, but we did have a program where members of our ski school would go out and our customer service department would go out to various lodges on a regular basis. They would show any number of films that we would be involved in the production of.

Again, it would be an expansion of the snow hostess program that I mentioned a few minutes ago, where they would offer the ski school services, perhaps talk about techniques or one technique vs. another, one ski vs. another. All of the [315] different things that a skier might think about before he goes onto the slopes the following day.

* * *

[316] Q. What types of tickets were offered in '77-'78, just briefly?

A. Again, we had the four-area ticket which was the primary package ticket. We had a one-day and a three-day, and I believe a five-day lesson and lift package. The Aspen Skiing Corporation had a one-day and I believe they introduced a six-out-of-six day, three-mountain ticket only, to the exclusion of Aspen Highlands.

Q. Now, in that year who sold the four-area ticket—or the four-area—joint four-area tickets?

A. Well, they were sold by many different agencies. The primary agency from our point of view—the one that we promoted and advertised—was the Aspen Reservation service; and then they [317] would have been sold by a handful of major tour operators throughout the country and then minor travel agents.

Q. Could you explain to the jury how Aspen Reservations, tour operators, and travel agents are compensated for selling a ticket like the four-area ticket?

A. Well, normally all arrangements are handled on a commission structure. The ticket is structured at a certain price, and then there is a commission structure which in some ways becomes almost classic, in that that percentage is the same year after year. Does that answer the question?

* * *

[318] Q. Could you describe what national promotions Aspen Highlands participated in in 1977—the '77-'78 season?

A. The program basically had already been set into motion by my predecessor, and it was simply being carried out; but there was national advertising. There were drop-in ads in newspapers. There were ski shows that were for the consumer that were done, and then we instituted a new

program. It was new that year. It was a national marketing tour called Ski Group '77, which was directed at the trade, the trade being defined as the travel groups, ski clubs, travel agents, tour operators, and airlines.

Q. Was there some national promotion done through Aspen Reservations, Inc., in which Aspen Highlands participated?

A. Yes, and I am not specifically aware of those things. That was—we put a lot of money into it, and yes, there was.

Q. What was sold in these national promotions?

A. Aspen. The package of coming to Aspen.

Q. Was there also a film that was produced that year?

A. Yes.

Q. Or around that time?

A. There was a jointly produced film.

Q. What was the name of that film?

A. Beginning of a Love Affair, by Freewheeling Films.

Q. By what?

[319] A. The company that produced it was called Freewheeling Films.

Q. What could you tell me—what was the purpose of producing that film?

A. Well, it was to—I would say it was to show the general overall ambiance of the four-mountain complex of Aspen, of what the guest could expect, what he might envision himself or fantasize himself doing and having happen to him; but it was the overall experience and the conveniences that were available to him in the single resort of Aspen and the opportunity that he would have with the great variety on four mountains.

Q. And what audience did this film—was it presented to?

A. A national audience.

• • •

[320] Q. Okay. How did the Adventure Pack start?

[321] A. Well, I guess I have to set it in a time frame.

Q. That's fine.

A. At one time, I remember we discussed that we were becoming aware that there were—that there was talk that apparently we might not have a four-area ticket again in coming years; and as a marketing person, my responsibility was to look at the alternatives. I can remember one day talking to Mr. Jones. He said to me that he wanted me to begin to prepare a conceptual idea for a four-area ticket that would be sponsored by the Aspen Highlands Skiing Corporation alone.

In fact, I remember he was terribly emphatic. I started just working through figures in my head, and I took them to him and he slammed his fist down on his desk. He said, "No, I want you to understand something; I want a four-mountain ticket regardless," and so that was my assignment. I went off and pursued it.

Q. Now, could you just describe generally the concept that you attempted to develop at that time? The concept of the Aspen Highlands having one mountain offering a ticket that would allow the skier to ski at four mountains?

A. Well, I had to start from the standpoint of economic feasibility of the ticket. In other words, one that we might be able to structure where we could at least have some profit return in it; and so I looked at the combinations that were available to us, whether a skier would come and ski Aspen [322] Highlands, let's say—well, be required to

ski Aspen Highlands one day with an option of skiing anywhere else he would like to five days, then doing the same combination but making it two days at Aspen Highlands or three days at Aspen Highlands or whatever. We began there.

Q. Let me stop you here for just a moment. Why did you design a ticket that would be good for six days? What was the reason for choosing six days?

A. Oh. Generally a guest—we are a destination resort. That means to a person that they plan to come there for a period of a vacation time, and that normally for us is one week. If you figure the transition time—that is, the time it takes you to come in, get installed in your motel or that same time to check out and leave, it allows you about six days to ski. So we wanted to structure a ticket which would give the person the opportunity to ski, if that is what he wanted to do, any and all of those six days.

• • •

[324] Q. Now, did you consider—let me go back for a minute, Mr. Comstock, Did you consider other alternatives such as not offering an Adventure Pack at all and just attempting to offer a daily lift ticket?

A. Yes.

Q. And what was the conclusion that you reached?

A. Well, that was prior to the discussion I just referred to with Mr. Jones, where he was so emphatic about saying, "I will [325] have a four-area ticket." In that conversation, it comes down to the fact that the guest, when he is in Dallas, Texas, or Los Angeles, or New York, or wherever his home is, as I said earlier today in my testimony, doesn't make a differentiation. He is buying a unity package called Aspen. He doesn't realize that there is a differentiation between Aspen Mountain, Buttermilk Mountain, Aspen Highlands, or Snowmass economically. He just thinks of it

as Aspen and that he should have the right to go to Aspen and put his skis on and go to wherever he cares to ski and have the benefit of the experience of any of those four mountains.

Q. Now, having developed or having made the decision that the tickets should be three days at Aspen Highlands, how did you set up a mechanism to allow the person to ski at other mountains?

A. Again, you have to work from the standpoint of assumptions. You don't have anything concrete until you actually have it in some kind of a contract form; and the assumption that I worked on for a long time was that either through my efforts or other people in a managerial capacity at Aspen Highlands, we would be successful in our negotiations with the Aspen Skiing Corporation to accept one of several alternatives for the guest buying the Aspen Highlands sponsored six-day ticket, giving the opportunity of skiing on their mountains for a choice of anywhere from one to three days.

* * *

[327] Q. Did you have a discussion with Peter Sullivan at the beginning, or were they just with Mr. Madsen and—

A. Primarily with George Madsen and Jack Brendlinger.

Q. Now, would you tell me what did you say during those discussions?

A. Well, initially we would have started out and just told them of our general construction of the ticket, and I approached such things as, "Could we buy single-day lift tickets from you that we could have our guests use in the ticket we were trying to construct—buy these tickets from us?" That would be an example. Or another example, if we did it as a coupon structure piece: "Would you accept these coupons or redeem these coupons in exchange for a lift

privilege for that day or for a period of time?" That would be an example of the kind of discussions we had.

Q. And what was the response you received from Mr. Madsen and Mr. Brendlinger at that time?

A. They were not encouraging. They did not come out and say directly no at that time, but let's say they were not encouraging. They'd normally say, "I don't believe it will be a possibility, but we will check with higher management."

* * *

[328] Q. And what was the design that you finally arrived at, just briefly?

A. Six coupons. Three of them required redemption at Aspen Highlands for any three out of seven days of skiing at Aspen Highlands. Three coupons with a face value of $15.

The intention was that the daily lift ticket was $15, and that that could be redeemed for the daily lift ticket at any of the Aspen Skiing Corporation mountains.

Q. Mr. Comstock, let me take you back to these coffee conversations. Did Mr. Madsen or Mr. Brendlinger or Mr. Sullivan give you any indication of why they may not cooperate in these coupons?

A. There was one statement—or the statement was made on [329] a number of occasions that from an administrative point of view it would be impossible. That was one. Then they had another one, and they said that they had discontinued the use of what were called coupons or vouchers because in past dealings, for instance, other tour operators or wholesalers they had lost money in a redemption process.

Q. What response, for example, did you have to this question of potentially losing money on redeeming the Aspen Highlands coupons?

A. "Well, if you don't want to lose money, what you have got to do is get somebody to guarantee that whatever you are doing, somebody else, a third party, will back it." The logical party in this case would have been one of the two banks that either of the two ski corporations did business with. There was the Bank of Aspen and the First National Bank of Aspen; so I approached both of their Presidents. I told them of the negotiating problem that we were having with the Aspen Skiing Corporation, and I said to them that I thought a possible solution to this would be if we were able to establish a trust account with both banks and that Aspen Highlands would pre-fund it, maintain it—in other words, keep that fund full of money so that on any given day, when the Aspen Skiing Corporation turned their cash pouch in to the banks, they could have immediate redemption for full face value. In other words, they would be paid right then $15 for every Aspen Highlands issued [330] voucher or coupon.

Q. Did you in fact make that arrangement with those two banks?

A. I did.

Q. And did you communicate that to Mr. Madsen and Mr. Brend'inger or Mr. Sullivan?

A. I did to all three of them.

Q. And what was the response?

A. Again it was no; and I did call Peter Sullivan and I had a meeting with him in his office and I said, "Pete, this is what we have done. I hope with this one more effort that you might consider accepting these coupons in exchange for a daily lift ticket."

I got a very, very definite response from him. It was a very negative response.

Q. We'll get to that in a moment. Could you tell me

what response you had in the earlier conversations to the problem of administrative hassle that they spoke to you about?

A. The idea was that the administrative problem that they would have would be that if somebody comes up and they have a piece of paper and they lay the piece of paper down and that is to be a redemption or a purchase for a daily lift ticket, this would create a problem for them. Actually, I had difficulty believing that, because other than cash—and I thought it was even more convenient than cash, because the face amount of this [331] coupon that we were offering was exactly $15. There could be no error. It was exactly the same value as their daily lift ticket and so I thought it would be more convenient even than cash; but they do accept and they have traditionally accepted, as far as I know, credit cards and traveler's checks, which require first of all signing and then giving change. You have to run them through the machine, etc.; and I thought this would even be more convenient than the traditional methods they were presently using.

• • •

[333] Q. What else had you done in the interim to attempt to work out an arrangement to facilitate exchange or redemption of the coupons—and now I am not necessarily referring to the Aspen Skiing Corporation.

A. Yes, I understand. There was one part of the program [334] that we had looked at, and I had only done some marketing research on it. I had not really done it yet in earnest, but that was what I talked to a few of the local businessmen about. I had mentioned that in our negotiations with the Aspen Skiing Corporation, stating that in the event that they chose not— or even in the case that they did choose to cooperate, would these local businesses be willing to act as redemption centers. In other words, could a skier go, carrying a coupon, and would you

consider it like a traveler's check with a value of $15. Could he go in and use it to purchase an item in one of these shops or restaurants, or could he redeem it for the full face value, like he would any other traveler's check?

I got a very positive response. I would say it was probably 100 percent from every businessman that I talked to in that initial market research, and that would have been at the time around September.

* * *

Q. Now, you mentioned a conversation with Mr. Sullivan that you had. Do you recall approximately when that was?

A. I believe it was right after the season had begun. I think it was right after the Thanksgiving opening. It had been in the first—no, first part of December.

Q. What was the purpose of the conversation?

[335] A. One more attempt to solicit the support of this program by the Aspen Skiing Corporation, and I felt really on behalf of the guest rather than on our behalf.

Q. What was the response of Mr. Sullivan?

A. I started to talk about that a couple of minutes ago. I felt that Peter reacted in a rather frustrated manner, or perhaps an angry manner. He came back and said, "Absolutely not. We will not have anything to do with a four-area ticket sponsored by the Aspen Highlands Skiing Corporation."

Really at that point, it was really beyond my imagination as to why not; and so I just asked the question why. The response was, "Well, we will not support our competition." That response actually shocked me at that time.

My answer to Peter was, "I don't understand why you think you," referring to the Aspen Skiing Corporation, "would be supporting the competition. Aspen Highlands has paid for all of the costs against this ticket. We have paid for all of the marketing cost. We are paying all of the

commissions. We have paid all of the national advertising and had planned to pay all of the national advertising attendant to the promotion of this program." I underlined the word "and" we were willing to pay the Aspen Skiing Corporation full value. We were not asking for them to give us a discount whatsoever. We were going to give them $15 for every single ticket that any guest wanted to purchase from them.

[336] I was told that they were supporting the competition, and I could not agree with that.

* * *

[338] Q. Now, in fact, did you do promotion and advertising of the Adventure Pack in the '78-'79 season?

A. Yes, Relatively extensively for us.

Q. Could you describe, for example, with respect to ARI—again, ARI is still in existence at this point under the auspices of Mr. Sturgis. Did the Aspen Highlands participate in the national advertising through ARI?

A. As I recall, this is the—is this '78-'79? Right?

Q. Yes.

A. We supported jointly an effort by Aspen Reservations in the production of what's called a glamor piece—just a brochure. I believe that our—we participated to the cost of somewhere around 6- or $8,000, and we gave them that money for production of this piece.

Q. And did the Aspen Skiing Corporation participate in [339] the production of this piece?

A. Yes. On a ratio based on this ticket utility we talked about before.

Q. And what was the purpose, or what was the theme that was sold in this particular brochure?

A. Aspen; and if you are interested in coming to Aspen, you are directed to—your inquiries are directed to Aspen Reservations, Inc., located in Aspen. The telephone number would have been very clear, and so on.

Q. Now, did you use this document which we have been referring to, which has been entered into evidence as Exhibit 20—did you use that particular document to advertise the Aspen Highlands four-mountain capability?

A. Yes. It was our primary marketing piece of that time.

MR. TRAUTMAN: All right. Let the Clerk hand the witness what's been marked as Exhibit 20.

Q. (By Mr. Trautman) Now, does Exhibit 20 have an insert in it?

A. Yes.

Q. Could you just identify what that insert is?

A. It's a piece that was produced by us. It's called, "Indulge your fantasies at Aspen Highlands." Basically it's a discussion of Aspen Highlands, and it's also a discussion of the four-mountain Adventure Pack and other lifts tickets that were available at that time at Aspen Highlands.

[340] Q. What use was this particular document made—who was it distributed to?

A. I believe that there were between 30- and 40,000 of them distributed to the trade, and the normal vehicle for that would be to give it to travel agents and tour operators for distribution to guests. In other words, this would be the type of a piece that upon inquiry at your travel agent he would give you, and it would help you make your decision on where you would want to go; and if it were Aspen, it would give you the information you would need to know in order to book your reservations there for the week you would care to be there.

MR. TRAUTMAN: Now, specifically if the Clerk would give you Exhibit 23A through N.

Q. (By Mr. Trautman) Those are again documents that have been entered into evidence at this point, Mr. Comstock, and they are advertisements that were done by Aspen Highlands in the '78-'79 year. Is that generally correct?

A. Yes.

* * *

[341] Q. The question was what was the theme that was communicated in these national advertisements for the Adventure Pack specifically?

A. Well, perhaps I can read the banner on it. It says, "Ski the best and explore the rest with the four-mountain Adventure—four-mountain Aspen Adventure Pack." It was basically—

Q. Could you explain what was the concept? What was the idea behind that theme?

A. Well, that the person, when he would read it—it would say, "Aspen Adventure Pack"; and the idea of, "Ski the best ..." was that we feel that the combination experience that you can have—what I mean by that—the combination of terrain that's available to you and the types of trails and [342] open skiing that's found at Thunderbowl, etc., that's available at Aspen Highlands makes it certainly categorized in the "Best" area. The ticket would give you the opportunity to ski Aspen Highlands for three days and then to explore the rest, meaning that they would have three other days on the ticket to be able to explore the other mountains that were available to them in Aspen.

* * *

[344] Q. Could you first of all for the jury describe what a tour operator is?

A. I explained just a few minutes ago that a tour operator is the person who acts like a wholesaler. He is the person who takes this—if you can consider that—a finished package and offers it to either the consumer—you as a tourist—or to a smaller travel agent who does not buy large packages. He usually as a tour operator puts together a lodging base—in other words, some place the guest will have to stay for a specific period of time—and will generally arrange for the transportation from that locale in which the tour is originating to the destination resort and return.

Q. Now, how many tour operators did Aspen Highlands use in the '78-'79 year approximately?

A. Oh, I would imagine, if I can break it into two categories—we had about 10 that were of a sort of a major size and then we probably had 20 more that were more or less considered in a minor capacity.

* * *

[355] Q. Mr. Comstock, during the '78-'79 season, were there problems of customer confusion in terms of the type of tickets that people, for example, brought to Highlands, thinking they could ski at Highlands?

A. Yes.

Q. Could you describe those problems?

A. We had as a regular occurrence people just simply coming up to the lifts and attempting to board and being told by our lift operator that they did not have a proper ticket.

Q. What kind of a ticket did they have?

A. They had an Aspen Skiing Corporation three-mountain, six-day ticket.

[356] Q. How often did this happen in the '78-'79 ski season?

A. Well, I don't have the statistics—you know—exactly; but from my experience it was on a very regular basis, like daily.

Q. Did you deal with any of these people personally?

A. Yes.

Q. Could you tell me what would happen in those circumstances?

A. If I can use an example, there was—I believe the man was a dentist. He was from the Des Moines area, came out with two of his children, and he had been told by our base lift operator that he could not board. He became somewhat irate and she had referred him to my office, which is right there on the ski slopes.

He came into my office and started out, "Well, I want to go skiing here, and I don't understand why I can't." When we got the situation slowed down and explained that there were two different tickets, well, what came out is irritation occurred because he had intended when he came to Aspen to be able to ski all areas and had particularly asked that question when he made his reservations. He did happen to make his reservations through Aspen Reservations, Inc.; and so he thought that he had basically been misled.

I suggested that perhaps certain remedies could change his particular plight at that time.

[357] Q. Did you deal with more instances like you described, other than this doctor from Des Moines?

A. Yes.

Q. Now, what in that situation—what would you do?

A. Well, I would mention his options to him.

Q. What were his options?

A. That he could stay at Aspen Highlands that day and ski, but he would have to or be obliged to buy a daily lift ticket at the full retail value. That would be Option 1.

Q. Did many of them do that?

A. No.

Q. What other options?

A. That I could call Aspen Reservations on his behalf and arrange for them to either make a refund; and if there were a refund involved, usually, as I recall, he would take his tickets down and the refund might not occur immediately. The check might not be cut at that time, but he could expect to find it waiting for him when he returned home, or he could exchange the ticket for Aspen Highlands sponsored four-mountain Adventure Pack.

Q. How long would that process typically take if, in fact, a consumer decided to do that?

A. Well, if you consider that from the time he got up in the morning and he got his transportation to Highlands and he probably stood in the lift line at the base, he came to my [358] office and went through that and I made the exchange parlay available to him, it would take better than half a day out of a six-day vacation.

Q. Now, what other options did the skier have in that situation?

A. To simply give up and accept the three-mountain ticket and go ski the Aspen Skiing Corporation mountains only.

* * *

Q. Now, Mr. Comstock, did you ever have occasion to have discussions with Mr. Art Pfister concerning the discontinuance of the four-area ticket?

A. Yes. I did happen to talk with Mr. Pfister.

* * *

[360] Q. What did Mr. Pfister say to you?

A. Well, he sort of just passed it off. In continuing along the same line of conversation, I said to him—I said, "Do you think there is a possibility that we will be able to continue our negotiation and perhaps reinstitute the four-area ticket as we have known in the past?"

Q. What did he say to you in response?

A. He said no, he didn't think that that would be a possibility; and he added, in fact, that he felt that he was rather instrumental in getting rid of what was known then as the four-area ticket; that he played a major role in that.

Q. Could you explain what he said in regard to his instrumentality in getting rid of the four-area ticket?

A. My recollection is that he said or had urged that the Aspen Skiing Corporation make an offer to Aspen Highlands during that offering period that would have to be refused by Mr. Jones, that would not be acceptable in any manner by Mr. Jones.

Q. Did he use those words, to the best of your recollection?

[361] A. I believe he used "an offer that Mr. Jones could not accept." I believe that would be close to the statement.

* * *

Testimony of Thomas Richardson

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[400] Q. Is it true that Mr. Brown felt that Aspen Highlands was an inferior product and that you had a concern of associating yourself with Aspen Highlands?

A. Yes, because the customers would feel when we had a four-area ticket that Aspen Highlands was part of the Aspen Skiing Corporation.

Q. Do you consider the Aspen Skiing Corporation to be a superior product to most skiing corporations in Colorado?

A. Yes.

Q. Do you consider it to be superior to Keystone?

A. Yes.

Q. Do you consider it to be superior to Arapahoe Basin?

A. Yes.

Q. Do you consider it to be superior to Copper Mountain?

A. Yes.

Q. Now, it's true, is it not, that you associate with those mountains in the offering of a four-area ticket in Summit County. Is that correct?

Breckenridge has a ticket with Copper and Keystone.

[401] Q. Yes. That's right.

• • •

[422] Q. Do you recall your testimony earlier today in which you said Breckenridge was a inferior area?

A. Yes.

Q. Were you saying that Breckenridge was inferior to Copper Mountain?

A. In its present state of the art, it does not have the facilities Copper has and therefore does not have the type of product that Copper has; and Copper probably has a better product, yes.

Q. Is it inferior to Keystone?

A. Physically, it could be better than Keystone; but at the present, it, in my opinion, is not as good a product.

Q. Is it inferior to Arapahoe Basin?

A. I would say it's a better product than Arapahoe Basin.

• • •

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATON)

[423] Q. You indicated that at the July, 1979, Board of Directors meeting, there was a discussion concerning the former Attorney General's Office on the one hand and another lawsuit.

A. Yes.

Q. What did you mean by that?

A. It puts you in the situation where it is a Catch 22. If you try to adhere to the lawsuit that the Attorney General had initiated against the Aspen Skiing Corporation, it could run straight into that—into opposition with the lawsuit with Aspen Highlands. You are damned if you do and you are damned if you don't.

• • •

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

[424] Q. You are familiar, are you not, Mr. Richardson, that the Attorney General's lawsuit which resulted in a consent decree did not prohibit the four-area ticket from continuing. Isn't that correct?

A. There were certain stipulations concerning the four-area ticket, but it did not prohibit it. That's right.

Q. And in fact it was offered the next year, '77-'78; isn't that correct?

A. That's correct.

• • •

Testimony of Don Robinson

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[429] Q. Now, how many lifts does Aspen Highlands have?

A. We have 12 lifts.

* * *

Q. Now, how many lifts did you have when you started in 1958?

A. We had actaully [sic], in 1958—we had two chair lifts and one T-bar, which we had purchased from the Aspen Skiing [430] Corporation that was no longer in service there.

* * *

Q. Okay. Thank you. Now, subsequent to the initial installation of those lifts, did you develop further lifts?

A. After that time?

Q. Yes.

A. Yes, we did. In 1959, we installed a Poma Lift in [431] this general vicinity. Again, it ran up the hill in a little different line than this one, probably terminating right about this point, right here. That was a Poma Lift.

Q. That was 1959?

A. That was in 1959.

Q. Okay.

A. Do you want me to go on?

Q. Just keep going chronologically, if you could.

A. In 1960, we started construction of this Cloud 9 Chair Lift, and this was finished in 1961, as I recall. There was a problem with some parts or something there.

Q. Okay. Mr. Robinson, I think there may be a gap there. Could you indicate where the Exhibition Lift was when you first constructed it?

A. Yes.

Q. How far did it go?

A. It went all the way to Midway, right here; and that was one entire lift at that time. It was 8,800 feet long.

Q. Okay. Now, continue with Cloud 9.

A. The Cloud 9 was developed in 1960 and 1961. Up until that time, our mountain basically stopped right here. At that time it opened up much more of our mountain; so this was done in 1961.

In 1963, we decided that we needed a lift on the upper mountain there. We took the original Thunderbowl Lift [432] out and reinstalled it up at this location. That was done in 1963.

Q. What is that lift called?

A. That is Loges Peak Lift.

Q. Is that the lift that views the Maroon Bells?

A. Yes, it is.

Q. Okay.

A. Also about 1963, if my memory serves me, we installed one of the lower Poma Lifts. I believe it would have been this one right here.

Q. What was the purpose of that Poma Lift?

A. The purpose of that Poma Lift was for our ski school, for the beginning classes. It is also used for people that are going over to this lift to get to the top of it and ski down to that lift so that they don't have to walk across there.

Q. Okay.

A. So that was installed in 1963.

In 1964, we installed this other small Poma Lift right

here. The purpose of that also would have been for the ski school, primarily.

Q. Is that used for the ski school today?

A. Yes, it is.

Q. Okay.

A. I believe it was 1965 when we took a look at this area here.

[433] Q. What is that area called?

A. That's Thunderbowl, which is a very good intermediate skiing—beginning and intermediate—and we decided that we needed to put another chair lift back on that location. At that time, we did put another chair lift back here in the exact line that the original one had been.

Q. Is that the Thunderbowl Lift?

A. That is the Thunderbowl Lift, yes.

In 1966, we took the old T-bar out that was in here. We were having problems with it. People didn't like it real well. We installed a chair lift at this—in that location. That's the Smuggler Lift, and that also is a beginning type area right there.

In 1969 and 1970, we thought that we needed two ways up our mountain. Up until this point in time, we had basically one lift; and if this lift went down on us, we felt we would be in trouble. So we decided to install a couple of Poma Lifts to give us a second way on the mountain. We did that.

These are high-speed Poma Lifts. One of them runs from here to this location, where they can ski down and ski over to this area—to this other Poma Lift and then back to the Midway area. So that was done in '69 and '70 as a backup way up the mountain primarily and hopefully to give us more capacity on the mountain.

In 1970, we constructed Olympic Lift, which is this [434] lift right here, again to help alleviate the lift lines on this particular lift, which was a very, very popular lift on our mountain and also to give us that backup capability there in case something happened to this lift. We would have this one open.

From there we go to 1975, and that is when we installed this chair lift on this area to help hopefully to take some of the people from this area and put them over on this side of our mountain, which is fairly under-utilized—an under-utilized side of our mountain, and that was the purpose of that.

* * *

[450] Q. You mentioned something about fewer people being on the slopes. Could you describe just from your experience of a person that's been on this mountain for a number of years, [451] prior to 1977-'78 and after '77-'78?

A. Well, prior to 1977-'78, we had the four-area ticket, and we saw—I saw, although I didn't have the exact numbers—I saw a great many people skiing on our mountain. After the elimination of the four-area ticket, the skier days drastically dropped; and of course, they have declined every year since then, since that time.

Q. Do you believe they've declined because of the quality of skiing experience at Aspen Highlands?

A. No, I do not.

* * *

Testimony of Ronald M. Thompson

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[454] Q. Do you perform inspections of the four ski areas in the Aspen region?

A. Yes, I do.

Q. How often do you perform those inspections?

A. I am usually doing some sort of inspection in each ski area once a week.

• • •

[458] Q. Now, as to quality, do you have an opinion as to the quality of the four ski areas in Aspen, Colorado?

A. I think Aspen, Colorado, has four of the finest ski areas in the United States.

Q. Let me focus on Aspen Highlands for just a moment. Since 1977-'78, up through the present season, have you noticed any deterioration in the quality of skiing experience provided by Aspen Highlands?

[459] A. No, I have not.

• • •

Testimony of Bernard J. McMahon, Jr.

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[502] Q. Has [sic] the Director of Marketing, I take it your job and your responsibilities really focus upon selling some product for Aspen Highlands. Is that how you would characterize it?

A. I would characterize—well, marketing in general is determining the need and developing the product. The product in this case was the mountain itself. There were what I would call sub-products as far as the vehicles that the visitor to Aspen would use in skiing Aspen Highlands.

Q. What is it in your estimation that Aspen Highlands has to sell to the skiing public?

A. Well, that might be a little biased; but I think Aspen Highlands in probably the finest, well-balanced mountain in the Aspen area. The total Aspen experience consists of the Aspen mountains; and the Aspen Highlands specifically, as was mentioned in previous testimony, is the best-balanced mountain in Aspen, with 25 percent beginner, 50 percent intermediate, and 25 percent advanced. I think the uniqueness of the Highlands consists of the way we treat the customer when they come there. We are interested in families. We are interested in providing a whole experience for the entire family; and the skier, whether it be a total ski experience or in some cases merely spectator activities, as was mentioned before, that include the various free-style racing, picnics, and other activities we put on the mountain—it [503] doesn't necessitate being a skier at all in some cases. They can ride up as a foot passenger and watch some of these activities.

Q. What's your estimation as Director of Marketing of the market to which Aspen Highlands directs this product?

A. Well, I don't think there is any question—or in my opinion, our competition lies within Aspen and consists of the Aspen Skiing Corporation which controls the other three mountains in Aspen. I am particularly interested in getting skiers to the Highlands.

Q. In pursuing that goal of getting skiers to the Highlands, I would like to discuss briefly with you, if I could, the various marketing and promotional efforts that were pursued during the time that you have been the Marketing Director, starting with the '78-'79 season.

A. '78-'79?

Q. Excuse me—'79-'80 season. Could you describe for me any new directions that were taken in the marketing or

promotional efforts for Aspen Highlands—new from what had been present the year before?

A. Well, to mention a couple specifics, the Adventure Pack was discussed in some detail prior to my testimony. As you probably recall, it consisted of vouchers, of coupons, that were not acceptable to ski the other mountains as we had hoped; so in 1979 and 1980, to facilitate the experience of a purchaser [504] of the Adventure Pack, we included in High Season American Express Traveler's Checks. In this case, we put $50 worth of Traveler's Checks in this Adventure Pack. That, in effect, if we broke it down into costs, would have been giving the purchaser an extra $2 that year—the rate was $16—which would have provided three days of skiing that would have cost $48. We put $50 in American Express Traveler's Checks.

The reason for that, in case you are wondering, is that American Express does not have denominations that would have fit into that category, so we threw in an extra $2.

• • •

[505] Q. What led to the decision to include American Express Traveler's Checks, rather than coupons or vouchers.

A. As I mentioned earlier and as was discussed prior to this, the vouchers that were used the previous year were not acceptable to the Aspen Skiing Corporation as legitimate tender for a lift ticket on their mountains. We are always interested in the convenience of the visitor, and we felt that by providing the American Express Traveler's Checks that this would make it very easy for them to go to the Aspen Skiing Corporation's ticket office and purchase lift tickets; or actually they could take it about in town and use it at any of the restaurants or shops. It's totally a cash equivalent in the form of a traveler's check.

• • •

[507] Q. In addition to these changes in the makeup of the Adventure Pack itself, were there any other new directions or new elements of the advertising, marketing, promotional effort on the part of Aspen Highlands?

A. Well, we, as I say, tried to continue pretty much the same basic approach. However, the year prior to my arrival, there was a certain amount of expenditure in the national market [508] that we did not continue during the '79-'80 season. Those expenditures were primarily reflected in national advertising in Ski, Skiing, and Powder magazines. We did discontinue that.

However, we did continue exposure on a national level through various other means that we had done in the past.

Q. What means would those be that were employed to continue any national exposure?

A. Well, we do quite a few press releases. We work with the Colorado Ski Country U.S.A., who in turn does promotion throughout the country. We support the Aspen Chamber of Commerce that does promotions throughout the country. We belong to the American Ski Association—or we don't—I think we do have a membership, but basically when I say, "We belong," we work with the American Ski Association, and that is on the Front Range. They do promotion over here.

• • •

[509] Q. Did the maintenance of these efforts at national exposure and this national involvement require the same expenditure of advertisement dollars that the advertising exposure through Ski and Powder magazines in the previous year had required?

A. No, they did not. I am not sure what it was in that year, but if we run, as an example, just three ads in each of those magazines, in Ski, Skiing, and Powder, which are

probably three of the most popular skiing magazines, it could have added up to, including the production and so forth, another $100,000. I felt that by running those types of ads in those magazines at that expense about the most you can get out of it is an image identification. It's hard to get tangible results of that type of thing.

Q. I believe we learned from Mr. Comstock's testimony [510] that Highlands had pursued that expense of advertising campaign in the '78-'79 season, to promote primarily the Adventure Pack and Aspen Reservations, Inc. Is that correct?

A. That's my understanding; and as we discussed that type of exposure and trying to counteract the lack of a four-area ticket with the Adventure Pack through that type of media, it appeared to me that it didn't make sense to throw good money after bad on a project that really just didn't work.

Q. Were there any new elements of advertising copy or advertising items that were developed for Aspen Highlands during this period, during '79?

A. In the '79-'80 year? We tried—we always in the past had been working, I understand, with the lodges in Aspen, the Associations, and condominium managers. We feel they are very important. They are providing part of the overall Aspen experience. We continued to do that a little more extensively in that first year and offered all the lodge owners and condominium managers what we call a President's Club card. That was a card issued by Mr. Jones to the various people that he would like to recognize as contributing to the Aspen experience.

Q. If you could explain the President's card—what benefits that gave the holder and what the purpose of giving that card to the lodge owners would have been.

A. Right. The card itself was presented—could be presented to the ticket office in return ofr [sic] complimentary skiing [511] throughout the ski season.

Q. And what was the purpose of giving that kind of card to lodge owners?

A. Well, as I say, it's the people that—the lodge owners, we feel, make a fine contribution to Aspen, and we wanted to recognize that contribution they make. We hoped it would also give them an experience to come out and see the new developments that we had been doing at the Aspen Highlands on a firsthand basis and that would keep them current so they in turn could pass that information along to their various guests on a firsthand basis.

Q. Was there a new promotional brochure developed for the Aspen Highlands during that year, '79-'80?

A. Yes, there was. Our agency, who at that time was in Denver, did a new four-color piece for the Aspen Highlands; and they also did a new ski school brochure in two colors.

Q. Could you take a look at Exhibit 77? Is that the new brochure for the '79-'80 season that you have just been describing?

A. Yes, it is.

Q. Now, you mentioned that Aspen Highlands didn't pursue the kind of media advertising on a national basis that had been pursued in the preceding year; but was there any media advertising pursued by Highlands during 1979-'80?

A. Very much so. We continued to concentrate on the [512] local and regional advertising; and again, that was through the radio, the newspaper, various magazines—Aspen magazines and Tailwinds Magazine. Those two magazines were distributed locally in Aspen. Tailwinds Magazine is a publication of the Rocky Mountain Airways and is on the airline. Aspen Magazine is mailed nationally as well as picked up by local visitors; but it also is the in-flight magazine for Aspen Airways.

* * *

[515] Q. Mr. McMahon, we had been discussing the marketing and promotion efforts undertaken by Aspen Highlands during the '79-'80 season. You had run through the various print media advertisements that were used. Were there any other media efforts involved in your promotional attempts?

A. Not that come readily to mind in that year.

Q. Any radio or television advertising?

A. As I mentioned earlier, we did have radio advertising, [516] and we did that on a very consistent and frequent basis on both KSPN and KSNO, which are the AM and FM stations in Aspen.

Q. How was that radio advertising arranged for?

A. Well, we had arrangements with both radio stations that consisted of actual payments, and then we also did some trade-outs in an effort to get the most for our marketing and advertising dollar. Trade-out arrangements included an exchange for season passes. We worked also with KSNO, which is the AM station, on promotion and involved a contest—a weekly drawing. We would award a three-day Highlands lift ticket in exchange for plugs continually on the radio and the publicity of the contest itself.

Q. What was the primary focus of all of this advertising effort? What was its relationship to the Aspen Adventure Pack?

A. Well, the primary reason for doing all this was to attract people to Aspen Highlands and increase our lift ticket sales and exposure of the various options the skier had.

Q. Now, if we could move to the 1980-'81 ski season, you continued to function as the Marketing Director for Aspen Highlands that year, I take it.

A. Yes, I did.

Q. That's the year that's just been completed, the ski season that's just been completed?

A. Yes.

Q. Were there any changes in the advertising or [517] promotional approach that Aspen Highlands took during that year?

A. Yes. The major theme really changed over this past year. We mentioned many times that we are a family mountain; but prior to this, we often gave emphasis to the expert skiing terrain that we have. The previous year, the key word was superlative. Last year we started to again project the fun, friendly, family image that is available at the Aspen Highlands. We changed the format again of the Adventure Pack by going from American Express Traveler's Checks to all money orders for both High and Low Season, and we did a number of other promotions.

Q. You mentioned a change in advertising agency. Was there any change in the advertising style associated with that?

A. By changing agencies, we attempted to obtain more continuity among the various ads that we run. When you see the exhibits—and in fact, I suppose you have seen them—they are more of a graphic design. There is a continuity among the various ads that we did run for the ski school, NASTAR, the Adventure Pack, master's class, and those types of ads all had a continuity. When you saw one, you could relate it to another.

* * *

[521] Q. You have mentioned the continuing effort to market the Adventure Pack. Could you take a look at, I believe it's Exhibit 82? Could you describe to the jury what that is?

A. Exhibit 82 again illustrates the 1980-'81 Adventure Pack. As you can see, it is much smaller. It is changed in style. It's maintained the graphics of the other advertisements we were using that year. The reason we reduced the size is so this in turn could fit in a larger envelope. Again this is done for the convenience of the people that are working with travel agents and tour operators.

The High Season Adventure Pack last year was all money orders. We had three $18 money orders instead of the American Express Traveler's Checks. In the Low Season we had two $18 money orders, which is the same we had the year before; so we used the money orders throughout the Adventure Packs last year.

Q. And the reason for the $18 amount of the money orders was what?

A. Again we were interested in considering this as a four-area ticket or a four-area opportunity. The daily lift rate for the Aspen Ski Corporation mountains last year was $18; so that pretty much dictates the form of the Adventure Pack. We try to keep that money order the same price as the daily lift [522] ticket so they can take it over to the ticket office and obtain a ski corporation ticket or use it in any other fashion—or ski extra days at the Highlands.

Q. Did the 1980-'81 Adventure Pack also include Aspen Highlands three-day ticket?

A. It included a three-out-of-seven-day Aspen Highlands ticket; so they could skip days at Aspen Highlands and utilize the other mountains and also included the three discount coupons we discussed before that would give them discounts on the NASTAR and ski rental and ski school.

Q. During the time that you have been the Aspen Highlands Marketing Director, have you on your own or have you been involved with others in trying to consider

alternatives to the Adventure Pack as a ticket system for Aspen Highlands?

A. We certainly have.

Q. Could you describe some of that process and some of the other options that have been considered?

A. Well, we have thought of again—when I first started—thought of the single-day ticket arrangement. I learned that a lot of these same ideas had been thought of by other people and have been declined by the Aspen Ski Corporation as acceptable—an acceptable of way of forming an Adventure Pack. There are other options available as far as eliminating the Adventure Pack and we decided not to eliminate the Adventure Pack for a couple of reasons. (1) It would eliminate the four-area capability [523] that a visitor to Aspen might have. Also, when we worked with travel agents and tour operators, if we went back to just a three-day—three-out-of-seven-day Highlands ticket and if that is sold through a tour operator or travel agent, we pay a 15 percent commission, as was mentioned before. That would not be the same price as the higher-priced six-day, three-area ticket that the ski corporation offers. We felt that the travel agent or tour operator would not have had as much incentive to sell a lower-price ticket for Highlands as opposed to a higher-priced ticket that they would get more of a commission on.

• • •

Q. And has there been any consideration given to changing the mix of tickets available in the Adventure Pack; that is to reduce the number of tickets that would have to be used at Aspen Highlands?

A. Yes, there were. There was some thought given to that. If we reduced the number of days required at the Highlands, it would throw the economics of the Adventure Pack way off. In the Adventure Pack, as you probably

would surmise, when we pay a 15 percent commission on the Adventure Pack, we in fact are paying the Aspen Ski Corporation commission for them. We are paying a commission on the money orders and the [524] Adventure Pack.

When you take the cost of the Adventure Pack—

Q. What was the cost of the Adventure Pack for last season?

A. The Low Season was $76, and High Season was $96.

Q. When you are looking at the economics of the $96 High Season Adventure Pack, I take it when that's sold through a tour operator or travel agent, there is 15 percent off the top of that.

A. Just the basic mathematics of that is if you take the $96 we receive for that, we pay a 15 percent commission of $96. That's subtracted. Then we subtract the three $18 money orders, which is another $54, which gets our so-called net down to a very low stage. If we increased the number of money orders in there say to four and decreased the number of days at Highlands to two, you can see what that would do to our problem.

• • •

[526] Q. Have you been able to enlist the cooperation of Aspen Skiing Corporation in any joint marketing projects during the time that you have been at Highlands?

A. The only—I think there might be two that are nominal type cooperative efforts. One is in reporting the weather, the snow conditions. As I recall, our Customer Service Department cooperates with them in reporting that to [527] the national wire services. The other one is a poster that was recently produced that this type has Aspen Highlands indicated on it, and we paid 15 percent of the cost of that. Those are the only two that I can think of.

• • •

[528] Q. Mr. Comstock in his testimony, which you have indicated you heard, related efforts in the nature of national tours or visits to various national ski centers to promote Aspen Highlands. Has anything along those lines been engaged in while you have been Marketing Director?

A. The first year I started, 1979-'80, I started in May and I believe right before I started as Director of Marketing, one of the personnel from the Marketing Department had just finished attending the ski group meetings. The following year, I attended a couple of ski shows. The Flatlanders would be an example; and I made some trips to California, St. Louis—I think those are the main ones. We participated economically in the ski group that year, but we did not send a representative.

I just returned from a ski group show for this year that took place in April and May and visited Miami, Atlanta, and Chicago. We had representatives from our sck [sic] school that had—well, Tom Williams, our Director of Skiing, visited Dallas. Our Assistant Director of Skiing visited Los Angeles and San Francisco for those ski group shows.

• • •

[533] Q. And is part of that planning the resolution of how [534] or if and in what form the Adventure Pack is going to be offered for the Aspen Highlands next year?

A. We have given some thought to that matter, and quite frankly the determination is going to be made after the proceedings here. We are operating right now under somewhat of a handicap. One of the problems is the $22 ticket that we have heard of that's coming next year from the Aspen Skiing Corporation. We are not quite sure if we can survive with an Adventure Pack including the $22

money orders. It puts us in an awkward position at this point to proceed with any concrete marketing plans.

Q. Why is the $22 daily lift ticket a matter of particular concern?

A. Well, as I mentioned before, the Adventure Pack consists of money orders that are made out in denominations of the daily lift rate at the other mountains. Last year it was $18. Next year, I understand from the announcements it will be $22 per day. The announcement was made that the Aspen Skiing Corporation six-day, three-area ticket be $114. That means that we would have to, in regular season, price our Adventure Pack no higher than $114. We would have to include money orders in there no lower than the amount of $22 to provide the convenience again for the customer to ski the four areas in Aspen.

Q. That's $22 per day?

[535] A. Per day.

Q. For three money orders?

A. For three money orders; so the mathematics work out $114. That's less 15 percent of $114, less $66 in regular season; and in Low Season, it probably even gets a little more awkward. I understand the Low Season six-day ski corporation ticket that was publicized is, I believe, $90 for their Low Season. There, if we used the same format, we would have to take 15 percent of $90 and include 44, or ideally again $66 worth of money orders. I don't think it would work out. I think we would end up losing money, and it wouldn't be worth it; so that's one of the considerations that we are taking into account at this time.

• • •

Q. Have you been able to arrive at any package ticket plan that Aspen Highlands could offer for the [536] upcoming season that would realistically continue to offer the possibility of skiing four mountains?

A. In an attempt to do that, I have talked to any number of travel agents, tour operators, customers to the mountain, the lodge owners. Not only have I not been able to—

MR. PALMER: Just a minute, Mr. McMahon.

I object. Hearsay. He's about to tell us what they have told him apparently.

THE COURT: I don't know if he is.

If you can answer the question without telling us what other people are telling you and see if you can answer the question directly, Mr. McMahon . . .

Hearsay is evidence from a third party who is not in court—an out-of-court statement offered for the truth of the statement. We want to try to avoid that.

If you can answer the question about your efforts, I think that was what was asked.

THE WITNESS: Your Honor, my attempt there was to say no, I have not been able to; and in seeking advice, no one else has been able to advise us of a better way.

• • •

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

• • •

[549] Q. Now, you referred yesterday to the '79-'80 advertising, which I believe has been marked as Exhibit 79. Has that been shown to the jury yet—that package?

Mr. McMahon, the theme of that advertising seems to be "Ski the Best for Less." Is that a fair summary of that theme?

A. Yes. That is mentioned in some of the ads.

Q. And by "the Best for Less," you are talking about [550] Aspen Highlands as being the best ski area in the Aspen area?

A. I think it's twofold, the best being Aspen and also Aspen Highlands.

Q. And the purpose of that promotion is to put forward Aspen Highlands as being the best ski area in Aspen, isn't it—one of the purposes?

A. That could be interpreted, and the motivation behind it was the best, as I mentioned yesterday, was Aspen and the Aspen Highlands. It gave the opportunity to ski all four areas.

Q. And your primary motivation is to attract skiers to Aspen Highlands, however.

A. Yes.

• • •

[551] Q. And in fact, some of your customers are located in Mexico, Canada, and around the world to some degree.

A. Yes, they are.

Q. So the Adventure Pack mailer was sent back to these people in their various home states and home countries?

A. That is correct.

Q. And the hope of doing so was that they would purhase the Adventure Pack?

A. That was the intent.

Q. Would you also agree with the previous testimony that these persons that you are seeking to attract are in comparison to the general populace relatively a mobile and affluent group of people?

A. That is the understanding I have from some of the [552] surveys that have been done.

• • •

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

[562] Q. Mr. McMahon, why does Aspen Highlands pursue national marketing efforts?

A. We still recognize there are two markets. There is a national market and then there is the sub-market which is Aspen; and we like to cover as much as we can within the parameters that we have and within the budget constrictions.

• • •

[564] Q. With regard to the single-day tickets offered now by Aspen Highlands or the three-day tickets offered by Aspen Highlands, are you familiar with very many instances in which the holders of a three-area, six-day ticket from Aspen Ski Corporation would also buy a three-day ticket from Aspen Highlands or a single-day ticket from Aspen Highlands?

A. No. In both instances, it would be very minimal. Once an individual buys a three-area, six-day ticket, he is really not there long enough to be able to avail himself of a single-day or let alone a three-day ticket at any other mountain without giving up again a punch on his ticket.

• • •

Testimony of Kristin Lawrence

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[569] Q. Have you taught any of the children of the executives of the Aspen Skiing Corporation?

A. Yes.

Q. Who is that?

A. About three or four years ago, I taught the children of Tom Richardson, who is the President of the Ski Corporation, Jack Brendlinger, who is in charge of public relations, and Peter Dahl, who is in charge of the children's ski school [570] programs for the Ski Corporation.

Q. What did Mr. Dahl do at that time?

A. I think he was in charge of the children's programs up at Snowmass.

Q. Similar program to yours?

A. No. At that time, all the children were over 5 or 6 years old at the Ski Corporation.

Q. He was in charge of that?

A. I believe so. I am not exactly sure.

Q. How old were the children of Mr. Richardson, Mr. Brendlinger, and Mr. Dahl at the time you taught them?

A. I think they were all 4 years old.

Q. Did you teach their children how to ski?

A. Yes.

• • •

[571] Q. What has happened to your business in the last couple of years?

A. Well, it's starting to go down. It's gone down.

Q. Do you believe that the elimination of the four-area ticket has been a factor in the downturn of your business?

A. Yes.

Q. Could you explain that?

A. Well, I feel that most families like to stay together [572] at one area and ski so that they can keep tabs

on their children; and most parents are hesitant to leave a 3 or 4 year old at an area while they go up and ski another area. Also, a lot of parents like to come down during the day to check on their children and ski with them.

Since 1978, there have been a lot of parents wanting to put their children in Snow Puppies, but they have Aspen Skiing Corporation three-area tickets. When they realize their ticket isn't good at Highlands, they take the children to Buttermilk.

They have two choices: They can take their ski school business to Snowmass or Buttermilk, or they can leave their children with me while they ski at another area.

Q. So they like to take that latter choice usually?

A. No. Generally they don't. They don't like to leave a 3 or 4 year old alone.

Q. Don't the families that come with say a husband and wife, mother and father, come with a three-area, six-day ticket good only at the Aspen Skiing Corporation mountains—don't they have a choice of buying an individual daily lift ticket at Aspen Highlands?

A. It gets expensive if you have already paid for the ticket. They just don't behave that way.

• • •

Testimony of Peter Sullivan

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[584] Q. Isn't it true that there was a certain amount of confusion that developed in the '77-'78 season, when there were two tickets offered? The three-area, six-day ticket by Aspen Skiing Corporation and the four-area ticket which included Highlands?

A. Yes. I believe there was some confusion.

Q. First of all, could you describe for the jury what was the difference between the two tickets?

A. Both tickets were around-the-neck tickets. As I recall, the Aspen Skiing Corporation six-day ticket looked similar to the Aspen Skiing Corporation three-day ticket, had a definite unique style that distinguished it from the four-area ticket. The three-area ticket did say, "This ticket valid only at Aspen Mountain, Buttermilk, and Snowmass," where as, as I recall, the four-area ticket was larger in size, clearly indicated that it was a four-mountain ticket, valid at Aspen, Buttermilk, Snowmass, and Aspen Highlands.

Q. You are familiar, Mr. Sullivan, are you not, with the fact that approximately 75 percent of the people that frequent [585] Aspen every year are return visitors, people that have been there before?

A. I have heard that.

Q. And those people that have been there before in that four-year period, '73-'74 through '76-'77, were familiar with the four-area ticket and they were not familiar with any other kind of multi-area, multi-day ticket. Isn't that correct?

A. Yes. That is correct.

Q. And isn't it true that the confusion that occurred in the '77-'78 season occurred because people came thinking they could ski all of Aspen and bought a ticket which they thought they could then ski all of Aspen with. Isn't that generally what the problem was?

A. Apparently.

* * *

[587] Q. Wasn't that the major concern he expressed from the very beginning of this ticket—that he thought

that the Aspen Skiing Corporation could do better than—could do better without Highlands?

A. That perhaps was his feeling, yes.

Q. Now, Mr. Brown and Mr. Richardson also felt that the Aspen Skiing Corporation was being associated with an inferior product. Isn't that correct?

A. That is correct.

Q. Did you feel that way, too?

A. I don't consider myself to be a quality expert. I was not hired for my skiing ability.

Q. Do your children ski?

A. Yes, they do.

Q. Do your children ever ski at Aspen Highlands?

[588] A. Yes, once—twice. My older son skied there twice.

Q. Have any of your children been taught to ski at Aspen Highlands?

A. As we discussed during the recess, you missed me when Kristin Lawrence was up here. My son was in the Snow Puppy Program.

* * *

[601] Q. Now, the next year, the first year there was no four-area ticket, it was good for six-out-of-six days. Isn't that correct?

A. When we offered a larger discount off the daily rate, we made that change.

Q. Okay. That isn't the reason you made that change that you essentially wanted to increase your revenue per skier?

A. We were—we wanted to get it back where it would be, because the ticket itself was more of a discount off the

daily rate than it had been when it was valid six-out-of-seven days.

Q. I understand that; but wasn't one of the purposes of making it valid for six-out-of-six, rather than six-out-of-seven, to increase the amount of revenue that would be derived if each skier were using that ticket?

A. That would have been in our minds, yes.

• • •

[603] Q. Let's explain to the jury how that refund policy worked. Isn't it true that the way it would be refunded is you take out your commission first—that is, if it had been purchased at ARI and there had been a commission of 10 percent—you take out $7.80 off the top.

A. Well, in various years that worked different ways.

Q. How did it work in '78-'79?

A. I can't recall whether that was a service charge year or whatever; but the point was that—well, it's similar to buying an airplane ticket through a travel agent. You know if you buy an airplane ticket through a travel agent and go to the airline to get your money back, they say, "Go see your travel agent," because they paid 10 percent on that. That's the [604] same situation we were in. We had paid a commission on that ticket; and since the tour operators—several of them would not give refunds directly—we felt it only fair that we at least recover the commission that we paid to the tour operator and then charge the customer the daily rate. So the customer basically was out of pocket for the daily rate; and if you bought the wrong—if the tour operator sold him the wrong ticket or inadvertently he bought the wrong ticket that he should go back to the tour operator similar to the way you and I would go back to our travel agent.

• • •

[606] Q. When you sought a refund on the six-day ticket, which was intended to be a ticket to be used all week, you would lose your discount off the daily rate. Is that correct?

A. Well, you know, it's like three cans of paint for the price of two. You don't take one back and get your money back.

Q. All right. And if you sought a refund of the ticket that was a commissionable ticket, essentially the consumer would have to in essence pay you that commission. Isn't that correct?

A. That is correct.

Q. Would you agree that that ticket refund policy makes it more difficult for a skier who wants to ski one day at Highlands and who has purchased a three-area, six-day Aspen Ski Corporation ticket to in fact ski at Aspen Highlands?

A. I would say it makes it more difficult for the skier who bought that ticket through a tour operator. I don't see how it makes it difficult for a skier who walked in and bought it over the counter.

Q. For the person who walked in and bought it over the counter, that person would still lose their discount; isn't that correct?

A. Well, yeah, if they didn't use it six days.

• • •

[607] Q. Now, in the '77-'78 season, again the Aspen Skiing Corporation offered a three-day ticket. Do you recall that?

A. Yes.

Q. And that three-day ticket was good three out of four days. Isn't that correct?

A. That is correct.

Q. And it was discounted off the daily rate. Is that correct?

A. Yes.

Q. And moving to the '78-'79 season, when the four-area ticket was eliminated, isn't it true that the management recommended the complete elimination of the three-area ticket—three-day ticket?

A. That is correct.

Q. And isn't it true that one of the reasons for the [608] management recommending elimination of the three-area, three-day ticket was to encourage customers to buy more three-area, six-day tickets?

A. Yes. We saw the popularity of the three-day ticket had increased the year before substantially.

Q. So one of your purposes in recommending elimination was to get people that had bought a three-day ticket previously to buy a six-day ticket at Aspen Skiing Corporation in the '78-'79 season. Isn't that correct?

A. If they so desired.

Q. Would you agree that a person that had purchased a three-day ticket at Aspen Skiing Corporation the year before would have an opportunity to go ski at Aspen Highlands the other three days?

A. Yes.

Q. Now, isn't true that in that particular year the three-day ticket was not advertised by the Aspen Skiing Corporation?

A. That particular year being what?

Q. '78-'79.

A. Okay.

Q. It was not advertised, was it? The availability was not advertised?

A. We intended not to offer it, I believe.

Q. And in fact it was not offered during the beginning [609] of the season. Isn't that correct?

A. That is correct.

Q. Is it true that there was tremendous skier dissatisfaction and comments over that particular issue during that particular point in time?

A. To turn it around, there was considerable demand for that ticket.

Q. I'll accept that. And in fact, in February of the '78-'79 season, as a result of that tremendous demand, you put back in the three-area ticket.

A. Yes. I am not sure as to the month.

Q. Three-area, three-day ticket?

A. Yes. I am not sure as to the month.

Q. It was actually, though, well into the ski season. Isn't that correct?

A. It might have been January; it might have been February. I don't recall.

• • •

[613] Q. So during that year when both the four-area ticket was available and the three-area, six-day ticket offered by the Ski Corporation mountains was available, approximately twice as [614] many four-area tickets were purchased by consumers than three-area tickets?

A. Not quite twice.

Q. All right. Not quite, but close?

A. Within 4 percent.

Q. All right. Now, your total revenue—your total multi-day, multi-area revenues as a percentage of your lift ticket revenues would have been about 35 percent. Is that correct?

A. Approximately.

• • •

Q. Okay. Now, what were your total lift ticket revenues in '78-'79?

A. Total gross at 14.9 million.

[615] Q. What were your total three-area, six-day revenues?

A. Approximately 6.4 million.

Q. Would you agree that then approximately 44 percent of your total revenues were attributable to Aspen Skiing Corporation three-area, six-day sales?

A. 44, did you say?

Q. I said 44.

A. 43.

• • •

[622] Q. Mr. Sullivan, isn't it correct that the three-day ticket was not advertised in the '78-'79 season?

A. That is correct.

Q. And was not put into effect until later in the season?

A. That is correct.

Q. The question is once it was put back into effect it was no longer a discounted ticket. When you say no longer, that is what confused me. It was not discounted when we put it back into effect.

Q. So in other words, if somebody bought that ticket they would pay three times the daily rate.

A. That is correct.

Q. Okay. Now, we have heard a lot of testimony about tour operator sales. Could you tell me for the year '78-'79 what percentage of the Aspen Skiing Corporation sales are tour operator sales of your total?

A. Approximately 19 percent.

[623] A. Okay. In '79-'80, what percentage?

A. Approximately 14 percent.

Q. And in '80-'81, would you agree again that it was approximately 14 or 15 percent?

A. I don't have anything here to agree with that.

Q. Did those numbers in terms of their magnitude make sense to you? In other words, is it true that 85 percent approximately of the people that buy your lift tickets buy them over the counter a the window rather than through tour operators?

A. At this point in time, between 80 and 85 sounds right.

• • •

[626] Q. Okay. Now, do you agree that the Adventure Pack would be less desirable to a potential skier if the Aspen Skiing Corporation would not redeem the coupons than if they would?

A. Yes. I think I agree with that.

Q. It made it more difficult, did it not, Mr. Sullivan, for a skier to have to go to a restaurant or a sporting goods store or whatever to redeem that coupon and then buy a lift ticket.

A. And conversely, it made it much easier for us.

• • •

Testimony of Valorie Britt

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[677] Q. Now, were there ever any instances during the '77-'78 season when Highlands ticket sellers would send people over to the Aspen Ski Corporation to get refunds?

A. Now, this is the year after the four-area ticket was—

Q. No. This is the last year of the four-area ticket, '77-'78.

A. Well, there really wasn't any point in sending a customer to the Ski Corporation, because the corporation couldn't do anything more than we could do. We would take the refund application. It was silly to send someone on a wild goose chase, when we could do it just as easy.

[678] Q. Did that ever happen to your knowledge?

A. Not from any of my ticket sellers.

Q. Would you do something like that?

A. No. I mean they have enough problems just coming to Aspen. Why send them running around town?

Q. Now, were there problems during the 1977-'78 season with people coming to Highlands who had been sold a three-area ticket but wanted to ski four areas?

A. There was some confusion because a lot of customers would come thinking they had purchased a four-area ticket; and then when they got to the Highlands to ski with it, they in effect had a three-area ticket which they couldn't use at the Highlands. Primarily these instances were with people that had purchased their tickets through Aspen Reservations, at least to my knowledge it was, and then there wasn't much we could do with the customer. I tried

several times to contact Aspen Reservations to see if they could bring out tickets; but most of the time these happened on weekends when I couldn't get ahold of anyone at Aspen Reservations.

Q. What would the people do?

A. Besides be furious, they sometimes, if the customer seemed to be really irate—I would give them a comp ticket for the day just because it's already ten or eleven o'clock and he's wasted half the day of skiing. I had to direct them to either the Skiing Corporation or Aspen Reservations if they [679] wanted the four-area ticket, or just suggested they buy one and try to get a refund later from the party that they purchased it from.

• • •

Q. Turning to the '78-'79 season for a moment—this is the season that there was no four-area ticket offered jointly among the various mountains in Aspen. Were there ever any problems experienced that year with people showing up at the Aspen Highlands with an Aspen Skiing Corporation three-area ticket wanting to ski at Highlands?

A. The people that I came in contact with were normally customers that had in the past been able to buy a four-area ticket. Maybe to start off a little differently, most of the customers were directed by lift operators to the Skiing Corporation—you know—with their three-area ticket; but sometimes the customers were repeat customers and they would eventually get to the ticket office because they were so upset that they had the wrong kind of ticket.

Q. Would you handle these problems?

[680] A. Those were handled by me. The ticket seller would call me out to the counter and there wasn't anything I could do with a customer then, other than send him back to the Ski Corporation.

Q. And did you do that?

A. Yes.

Q. Now, did these people ever buy an individual daily lift ticket at Highlands after they had purchased a three-area, six-day ticket?

A. Well, I can't say that they never did. It's just most of the time they would just leave and ski over at the Corporation. They had a ticket for the Corporation, or I would suggest that they buy a daily ticket if they wanted to and then handle the refund later with the Skiing Corporation; but most of the time they didn't want to spend more money, because if it was just one person in the family, he might be willing to spend the 15; but usually there was a wife and three kids, so there wasn't any point in it.

* * *

Testimony of Buzz Fedorka

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[703] Q. Are you aware of any changes in the program at Highlands—the NASTAR program at Highlands that would explain the decrease that you have described?

A. We've made every effort to increase it by offering things to make the program more attractive. One thing that has been in our Adventure Pack is that we offer a discount coupon to make NASTAR an attractive event. We have even upgraded the quality of the what we offer by offering a coaching instruction program; but it continues—we haven't declined in the offering that we have. We have provided a better event, but we have less customers.

* * *

Testimony of Lee Miller

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[718] Q. No. The question is have you encountered guests who have purchased a six-day ticket—six-day, three-area ticket and then who have also purchased single-day tickets at Aspen Highlands?

A. And you are asking me have I heard of that?

Q. Yes.

A. I am going to have to say no to that.

* * *

Testimony of Alan Andreason

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[764] Q. Let's focus for a moment on the destination market, the Level 3 that you have described. First of all, who are the skiers that end up in that particular market? Can you tell me something about these skiers?

A. Sure. If you look at again the statistics that are available in these lodging studies and the lift studies that I talked about earlier, the Aspen skier apparently is a well-educated, relatively affluent, experienced skier who has skied a number of times in the past, who typically describes himself or herself as a high intermediate or better skier, although whether or not it's probably giving one the benefit of the doubt in terms of skiing ability is not clear.

They have in the main—they are from outside of Colorado. They have come a long distance. Most of them come to Colorado or to Aspen for a typically a week's stay.

Now, that's the typical skier. That covers sort of quite a broad range. There are a kind of—particularly in terms of skill—there are a lot of people there who are beginner skiers, low intermediates, as I am.

Q. What are these particular skiers looking for when they are making their choice as to whether to come to Aspen—or when they do make that choice, what are they looking for?

A. The kinds of things that these particular customers appear to be looking for are of course relating to skiing items. They are looking for good snow and good skiing conditions; and [765] the Aspen area certainly has a reputation for having super powder and sort of reliable powder—that is with the exception of some years like the last one, I guess. You can pretty well count on there being snow there. You don't want to plan a vacation where you have to worry about if there is really going to be snow, as I guess there is a problem in New England, for example, when you have made your reservations in advance and it turns out at the end of January that there isn't any snow. That's a problem.

So the kind of things they are looking for first of all are good snow conditions; secondly, because they are relatively good skiers and because a lot of them—the vast majority of them—excuse me—come in some kind of group, either with a family or with a club or a group of friends, they are looking for variety. They are looking for a variety of skiing experiences, partly because they are going to be there for a week and they are going to get bored if they ski in one area for very long; and also they come with people of varying skills. They need some variety of slopes so that if they want to go out and ski the difficult areas their spouses or their buddies who are just starting

out skiing can go on the bunny hill or the not-so-difficult slopes. So they are looking for good snow, a variety of ski runs. They are looking for—since skiing only takes up part of their vacation—they are also looking for lots of interesting after-ski life, good restaurants, a variety of [766] shops, kind of an interesting atmosphere to go to.

Many of them seem to be looking for a kind of no-hassles kind of vacation. For many of them, it is getting away from work, getting away from the rat race back home; and they'd like to get out to an area where they don't have to make any decisions, where it's pretty easy to get to the slopes, where it's pretty easy to get in and out of the area by airlines or whatever. Aspen, I guess, isn't too great that way, as I discovered one Saturday. I guess those are the principal things that they are looking for, my research suggests.

• • •

[768] Q. Do Aspen Highlands and the Aspen Skiing Corporation mountains compete at this destination market level in your view?

A. Well, in my view they don't really compete with each other. Now, they both have separate programs to try to bring people to Aspen. Also they cooperate in a lot of marketing programs, again to try to attract people to Aspen through the Chamber of Commerce, through the Central Reservation Systems, and so on, that are essentially designed to get people to come to Aspen. But in that sense they are cooperating together. They are not competitors in that sense, at Level 3. They are cooperating together to compete against these other areas to bring people to Aspen.

The competition, as I see it, between the two organizations is at that last level.

• • •

[770] Q. Could you describe—basically describe the activities, if you will, of the skier once he arrives in Aspen in terms of his choices of areas to ski?

A. Well, what happens once they get to Aspen, they typically are there for six days. A very substantial proportion [771] of them are there for at least six nights of lodging. Something like 85 percent of them fit under that category, and so they are typically locked into some kind of accommodation for six months—six weeks—

Q. Six days.

A. Six days.

Q. Do you want to take a drink of water?

A. Yes. I should see whether it's longer than my usual 50-minute lecture. Okay.

For six nights they are locked into the area and most of them—something like 76 percent of them—stay in Aspen for the entire ski vacation. Professor Goeldner's data suggests that 23 percent of them may in fact go somewhere else as part of that vacation; but although the data don't suggest it precisely, I expect for most of those, it's after they have been to Aspen or before they have been to Aspen. They may go somewhere else for a few days. That's partly because many of them indicate that they don't need a car while they are in the Aspen area. Something like 69 percent indicate that a car is not necessary.

That is one of the nice things about Aspen, as I said earlier. Everything is convenient. There is a bus system.

Secondly, Aspen is geographically isolated. It is up at the end of the highway. In the wintertime, I gather that that pass at the other end is blocked. You can't get through [772] that way; so to go anywhere else of a comparable nature—you have to remember these are very experienced people. The comparable thing is not a rinkydink resort. They are thinking of Vail, and although I have never tried it, I gather it's two and a half, three hours away. They

are kind of locked into the Aspen area for six days, and they usually at that point sort of have to make some decisions as to where they are going to do their skiing.

• • •

[773] Q. Is price important in your view in terms of their decision which area to ski, once they arrive in Aspen?

A. Yeah. Once they arrive in Aspen, I don't think price is particularly important. I thought about that, of course, because obviously one of the questions—you know—as I saw it, is that Aspen Highlands was put at a disadvantage because they couldn't offer—or at least it was hard to offer—the four-area ticket after the Aspen Ski Corporation sort of bowed out of that arrangement. The question was could they cut price.

Well, if you look at this sort of lift ticket—Remember that these people are spending on a per-day basis something like, if you don't include the transportation costs, they are maybe spending—what did I say? Something like five or six or seven times just the lift ticket cost itself, that five-to-one figure that I was talking about earlier, which doesn't precisely count lift tickets. The actual expenditures beyond the lift tickets is something like eight or nine to one; [774] but if you think of say 25 percent reduction in the lift ticket price—that is, if Aspen Highlands cut their lift ticket price 25 percent—the result of your total cost for the day might be a 2- or $3 reduction in total cost; so when people talk about a total day in Aspen, which most of them see as a pretty darned expensive day, cutting the price of a lift ticket 25 percent is not going to make a lot—a heck of a lot of difference in terms of where they are going to ski. They are going to be looking for variety, convenience, and sort of no hassles, which is one of the things they seem to be looking for.

• • •

Q. What has been the effect in your view of the elimination of the joint four-area ticket that was offered through the '77-'78 season in the Aspen market?

A. Yeah, well, the effect in the Aspen market was, of course, at this fourth level. I believe it made the task of [775] Aspen Highlands in marketing to these customers, as I understand them in terms of what they are looking for, much more difficult because these people were looking for—and one of the things that was sold to them—was sort of this Aspen multi-mountain experience. Many of them wanted to ski the four mountains, and it just became much more difficult for them after the '77-'78 period.

Q. How do you know they wanted to ski four mountains?

A. Well, there are a couple of pieces of evidence there. One is again from the Aspen Skiing Corporation's records. Their data show that the year in which they offered themselves both a four-area ticket—four-mountain ticket and a three-mountain ticket—their sales records show that the four-area tickets out sold the three-area tickets at a ratio slightly less than two to one; so that would indicate to me that a lot of people would prefer to ski the four areas. Also, the most recent in-room study—

Q. Before you go into that, perhaps we could have Exhibit 75 handed to you so that you can tell the jury which study you are referring to.

A. Thank you. I am referring to a study entitled "Aspen In-Room Survey, 1979-'80," by Professor Goeldner and Alleta Stamp.

Q. Okay.

A. And there is a most interesting table in here. I [776] forget the page.

Q. Page 41?

A. Nope. Page 36.

Q. Close.

A. On page 36, one of the questions that was asked was whether or not there were any areas in the Aspen complex that people would like to ski but couldn't—you know—won't ski.

Q. What year was this survey done? That's what I wanted to make clear.

A. This was done in '79-'80.

Q. There was no joint four-area ticket in that particular year?

A. That's correct. There was no four-area ticket available in '79-'80.

Q. Go back again and tell the jury what the question was that was asked. I am sorry to interrupt you.

A. I guess I would have to look at the questionnaire precisely to see how it was asked, but as I understand the particular table the question was were there any of the mountain areas in Aspen that you would have liked to have skied this time around on this particular destination visit to Aspen but you won't be skiing there.

Okay. According to this, 53.7 percent of the respondents said that Aspen Highlands was one of those areas that they would like to ski.

[777] Then Professor Goeldner went on to ask what were the reasons that you won't be skiing this particular area that you have just mentioned in the study. About 40 percent of them—39.9 percent of them—say that their lift ticket wasn't good on those other mountains.

I would take those two things as evidence that there were a lot of people who felt disappointed that they didn't have this four-area ticket capability that had always been there in the past.

Q. Why didn't they buy a—why didn't they buy an individual daily lift ticket at Aspen Highlands?

A. Well, for two reasons. For those who had bought six-day tickets, I think despite the fact that they are all relatively affluent—a lot of them are relatively affluent when they go to Aspen—they are all sort of managerial types and they seem to be pretty cautious. Certainly the comments that I have had from individual skiers and from the tour operators, club people that I have talked to—they are pretty careful with their money and they would feel—these are the people who will buy the six-day, three-area ticket that giving up one of those days and going over to ski at Aspen Highlands would mean spending extra money. You know, they would kind of lose out that way. For many of them, skiing the seventh day—it's a six-out-of-seven-day ticket. Skiing the seventh day—probably most of them are exhausted and want one day off anyhow. [778] Many of them are involved in travel plans, getting in and out of Aspen. So it would really be a strain on them in that seventh day to go to Aspen Highlands.

For those who buy individual tickets, it's sort of hard to know about that particular case. I expect a lot of those individual tickets were for the spouses, the people who didn't ski quite so often and who were going along with expert skiers in those particular other areas—you know—whether or not these would have gone to Aspen Highlands kind of on their own and whether when the four-area ticket disappeared they would have—in its old form, at any rate—these people then would revert to buying individual tickets.

The proportion of sales at Aspen Highlands—I'm sorry—Aspen Skiing Corporation that were individual ticket sales, at least as far as I read this data, didn't go up appreciably. If people who missed out on the four—area capability and instead bought individual—you know—reverted to buying individual tickets as your question implied, that ought to show up in increased individual ticket sales at Aspen Ski Corporation. That doesn't seem to be the case.

• • •

[779] Q. Let's put us back in that position in time. What in fact should they have done at that point in time to try to compete within this fourth level Aspen market?

A. Well, the first thing that I would have done, which is exactly what they did, was to say, "Look: My study of the customers in this market suggest that they really want this four-area capability. If I am going to compete with Aspen Ski Corporation, which owns 75 percent of the capacity in this area, I've got to figure out some way that people who want to ski at Aspen Highlands can ski these other areas as well." So they put together the Adventure Pack, which had some nice [780] features to it, which a lot of those who understand the Adventure Pack, I think, feel make it a pretty good deal. In some ways, it is better than the old four—area ticket, because I guess Peter McMahon explained yesterday or the day before the nature of this Adventure Pack.

One of the nice features for those who understand it, if you will recall, is that it had the feature where you skied three days at Aspen Highlands out of seven and then you get some coupons or money orders that you could either use to ski at one of the Aspen Ski Corporation's three-mountain areas or you could turn these in and buy yourself a sweater or something or a dinner in town. A lot of people seem to appreciate that flexibility, because it didn't lock you into skiing. That is, if you got to the fourth day and you were exhausted or sunburned or—you know—somebody else just in your party decided they didn't want to ski that day, you hadn't sort of spent your money on ski lift tickets. You could take the coupons or the money orders and spend them doing something else. That was kind of an added flexibility. A lot of people seemed to appreciate that.

Q. What about their promotion and advertising?

A. Well, what they did at that period, as I understand it, was put a lot of their efforts into explaining the

Adventure Pack. One of the problems with the Adventure Pack, as I have said when I said, "Once you understand it . . ." is it's hard [781] to understand. I got this from a lot of the tour operators and a lot of the people in town that I talked to. A lot of the individual skiers who kind of thought about getting an Adventure Pack told me this. It's just darned complicated and a lot of tour operators, at least as they reported it to me, think a lot of tour operators really didn't take the trouble to understand it and market it very well.

So what Aspen Highlands did was to try to get out into the field, to go to all the various shows where the travel agents and tour operators would meet, to try to explain the Adventure Pack to them. What they tried to do, since there was the Central Reservations System then—they tried to make sure those people understood it. They tried to explain it, I gather, around the Aspen community, to minimize the amount of this kind of confusion which they recognized was a problem for them.

• • •

[784] Q. In your estimation, could—Well, let me ask you this: Why did the market share go down in light of these efforts?

A. Well, I think that basically two things occurred: One is that a lot of people wanted the four-area capability conveniently. It was—you know—even if they understood the Aspen Highlands Adventure Pack, it still involved, if they wanted to ski the four areas—it still involved skiing Aspen Highlands and going through this rigamarole of exchanging the coupons for other tickets, which meant every morning they [785] couldn't go right onto the slopes and flash their ticket. They had to exchange it; and that was a hassle for a lot of people, and a lot of people going to Aspen wanted to get away from it. They wanted to be there for six days or seven days and have no worries and relax, and this was an added hassle.

Given that there was available an alternative that gave them at least three mountains—you know—the logical choice that some people evidently made was to chose [sic] the somewhat easier approach.

Secondly, it was confusing. The market share went down, I think, because a lot of these middle men didn't particularly do a good job of explaining the Adventure Pack. A lot of people never really understood what the opportunity was and I think those were the two principal reasons that the market share went down.

• • •

[786] Q. Well, how does a single area like Aspen Highlands in a market with three other areas owned by the same company offer a four-mountain capability?

A. I don't see how they could do it any other way than they have tried to do it, as long as the other people don't [787] cooperate. I mean they have got 75 percent of the action and 85 percent of the market, and it doesn't leave Aspen Highlands very many options.

Q. In your estimation, could Aspen Highlands have effectively responded by increasing its promotion at the national level?

A. No, because—you know—just the arithmetic would suggest that Aspen Highlands—really, I would not advise them to put very much money into national programs, except to help explain the Adventure Pack and so on to tour and travel operators, because I wouldn't put a lot of money into marketing at the third level, if I were Aspen Highlands, because if it gets a lot more people coming to Aspen, the beneficiary is going to be the Ski Corporation because they have got 85 percent of the market. So I don't want to spend $1,000 promoting Aspen as a destination resort—you know—if the guy around the corner is going to be the major beneficiary of that. So I would put most of my resources into this competing for people once they get to Aspen.

Q. Now, you mentioned the Aspen Skiing Corporation not cooperating in the four-mountain capability. Did that have any effect in your view on Aspen Highlands' ability to compete in this Aspen market?

A. Yes. Well, I have already described the difficulties and disadvantage they were put to by having to offer the Adventure [788] Pack. I gather some of the early efforts that the Ski Corporation engaged in to sort of discourage the translating of coupons into days of skiing at the Ski Corporation also added an additional burden to Aspen Highlands; that is, they had refused to honor the coupons that Aspen Highlands had arranged to work out with the local banks so that Aspen Ski Corporation could get its money right away, which would be almost like scrip or almost like money. But the fact that they wouldn't honor that made it difficult for Aspen Highlands.

Q. And do you know how many of the people that come to Aspen Highlands on a yearly basis are newcomers?

A. Yeah. About 23 percent, according to Professor Goeldner's data, roughly, have never been in Aspen before. These first-timers come, you know, sort of for the Aspen experience, the Aspen mystique.

Q. When they decide to come to Aspen, when they make that choice at Level 3 that they are going to choose Aspen and come to Aspen, what is it that they are essentially buying?

A. Well, a lot of those things that I talked about earlier. I think a lot of them are probably buying the kind of things that they can tell the folks back home they've experienced. They skied all the mountains that are in Aspen. They have done the restaurants. They have done the night life. You know, they have seen a hippie or two—you know—that kind of thing.

[789] Q. Does the national promotion of the Aspen Skiing Corporation in the years since the elimination of the

four-area ticket—does that have an impact upon the choices of these newcomers that come to Aspen?

A. Yeah. I would think that the materials that I have seen, that Aspen Ski Corporation put together, has been promoting, would lead a newcomer to believe that there are really only three mountains in the Aspen area; that is, that they identify the Aspen experience with the Aspen Ski Corporation's three mountains. So it may well be that a lot of people who have never had explained to them the Adventure Pack, who have seen pictures of the mountains—not that picture but other pictures of the mountains in the Aspen area in which there doesn't appear to be an Aspen Highlands anywhere—and of course none of the Ski Corporation's literature mentions Aspen Highlands. As a result, they may very well believe that buying the three-area ticket, as many of them probably do in the first day or two before they really know what's going on in the Aspen area—they think they may be buying Aspen.

Q. Now, could you describe for the jury the importance of newcomers, if you will, to a competitor at the fourth level such as Aspen Highlands being able to maintain and enhance its market share?

A. Well, a lot of these people—we are all sort of creatures of habit. Everybody who comes to the Aspen area again [790] and again will develop certain preferences. You know, they will certainly end up preferring one particular area vs. another; and they may sort of move up to the tougher mountains, although I don't know whether people like me would ever get to ski down Ajax, which is kind of frightening. But if you don't get them when they first come, in effect they may get the habit of getting—of going somewhere else. A lot of us are kind of lazy, and given that a lot of these people are looking for a no-hassles vacation when they decide to come to Aspen, as many of them do, as repeat customers they may go back to the place that they started out from; so if Aspen Highlands doesn't

get a crack at them, so to speak, when they come as brand new people to Aspen, that puts them in not such a great—puts them in or at another disadvantage in the long run.

Q. Besides these things that you have already mentioned, does Aspen Highlands have other disadvantages due to the activities of the Aspen Skiing Corporation since 1978?

A. I guess those are the only ones that I can think of at the moment that I have mentioned so far. The only other disadvantage that I can think of is the—you know—the fact that Aspen Highlands can't easily increase its capacity. You know—as I guess has been testified to here, it is an awfully darn difficult thing to add extra mountains or extra capability at your area, at least very quickly; and the fact that this big competitor down the road and its three subsidiaries or [791] divisions—well, that kind of keeps you from 75 percent of the action, or it makes it difficult for you to give your customers access to the 75 percent of the action, and that really puts them at a disadvantage.

• • •

Testimony of Norma McNeill

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[809] Q. What's the normal period for which you can book the accommodations?

A. In Aspen it is seven nights.

Q. Is that pretty much exclusively the case?

A. For us it is, yes.

Q. Why, in your experience, is that the case that it is a seven-night stay that is involved in Aspen?

A. Well, working with the lodging community in Aspen, they prefer a seven-night stay vs. a three- or four-night stay. We do consider Aspen a destination resort, and we market it as [810] such.

Q. And then in marketing a ski lift ticket package, does that correspond to the seven-day stay of a guest in Aspen?

A. Yes. We market a six-day ticket to go with the seven-night stay.

Q. And what's the reason for marketing a six-day ticket rather than individual tickets or something to that effect?

A. Economy. It's cheaper to buy a six-day ticket rather than individual tickets and also convenient to the client.

• • •

Q. If a particular skier or a particular person booking a package decides to come to Aspen, does the purchase of a ski package through First Tours or through a similar tour operator involve any additional decisions on their part?

A. Yes.

Q. Could you tell the jury what those decisions would be?

A. Well, the type—first of all, he would have to ascertain the type of accomodations he is looking for—the lodging. Then the lift ticket choice also. We have two choices.

[811] Q. And what are those two choices at present?

A. The Aspen Ski Corporation six-day ticket or the Highlands Adventure Pack.

• • •

MR. MAYWHORT (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[814] Q. So assuming I am an individual located outside of the State of Colorado, again, and I am calling you and asking you to put together various packages for me as alternatives, would those various packages include optional lift tickets?

A. A lift ticket is not optional in a package. When you purchase the package, it has basic elements of lift tickets and lodging. The other optional elements would be car rental or trip cancellation insurance.

* * *

Testimony of George Madsen

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[839] Q. Yes. Now, could you tell me during this period of time, '78-'79, what percentage of the visitors that would come to Aspen would be newcomers?

A. I really can't recall the Goeldner surveys: but we normally said it ranged from something like 66 percent on an early survey three or four years ago to something over 70 percent.

Q. That were—I'm sorry.

Did you say have been there before, or newcomers?

A. It would have been the inverse of that; so something around 25 to 30 percent.

Q. All right; and is it true that a very high percentage of those come by commercial air?

A. Oh, yes.

Q. Through the Denver Stapleton Airport?

A. Yes.

Q. And fly Aspen Airways?

A. It ranged from 33 to almost 40 percent.

Q. Now, are you familiar with the fact that there was a sign in the Aspen Airways waiting room of the Stapleton Airport?

[840] A. Yes.

Q. That was created when the ARI was a joint venture? Do you recall that?

A. Yes, I do.

Q. Do you recall who paid for that sign—

A. It was paid—

Q. —when it was originally created?

A. I think it was paid—it was an ARI project. That's right. So it was paid in the normal promotional frame; that is, we split by the revenue distribution between the Ski Corporation—Aspen Skiing Corporation and Aspen Highlands.

* * *

[844] Q. Next slide. What about that one? Can you read the changes there for us?

A. Well, the one change—the major change was in the reservations number, which used to be 925-4000. Now it's 925-9000. In addition, the bringing it up to date meant changing the six-day lift ticket good at—it used to say "Four big mountains," and now it says, "Three big mountains," and Aspen Highlands is left out.

Q. Where did Aspen Highlands used to be on that sign? Was it where it says, "as well as"?

A. I would think so, yes.

Q. That's another picture—a bigger picture. Now, when this sign was originally put up, was the idea when it says

there is only one Aspen to again sell the entire community—the entire resort?

A. Yes. That's the purpose of the catch phrase; that Aspen is unique and also it is singular and that it is all one community.

[845] Q. So when "Aspen" is used in that advertising, it was intended to refer to the resort. Is that correct?

A. Correct.

Q. Now, the last paragraph there where it says, "Three mountains"—what did that used to say?

A. Four mountains.

Q. Now, this sign—what were the purposes from the Aspen Skiing Corporation's point of view of changing this sign?

A. Well, it started out for changing the phone number to the new Central Reservations number. Because of the other changes necessary, we were obviously touting our facilities.

Q. When you say, "our facilities"—

A. Aspen Skiing Corporation.

Q. Was the purpose to facilitate the sale of your three-mountain ticket?

A. Yes.

* * *

[847] Q. Mr. Madsen, the first timers, or 25 percent of the people that come to Aspen every year that have never been there before, having made their destination choice and having arrived in Stapleton Airport on their way to Aspen, looking at that sign—how many mountains would they think there were?

A. Three. Well, I'm sorry. I think it shows four mountains, but it talks about three.

* * *

[849] Q. In terms of your efforts at the Level 3, the destination level to get people to choose Aspen over Vail, did you continue as you had in the past years to market the whole Aspen community?

A. It depends on what promotional channel you are talking [850] about. I would say that I am sure from an economic standpoint you could say that we spent more time and effort to market the Aspen Skiing Corporation; but I would also have to point out that that wasn't—there wasn't that much greater difference from our altruism from promoting Aspen as a community, and we had done this for a number of years, as a matter of fact.

* * *

[851] Q. Now, does that particular brochure—the '79-'80 brochure—was that directed by the Aspen Skiing Corporation at the various national shows that you may have gone to?

A. Yes.

Q. Okay. Would that have been given to tour operators and travel agents and skiers?

A. Oh, yes.

Q. Given to skiers?

A. Any way we could.

Q. Now, does that brochure have a picture of Aspen—a map of Aspen, as some of the previous brochures did?

[852] A. Yes, it does.

Q. And does it show—does the map itself show all four mountains in Aspen?

A. Yes, it does.

Q. Does the map itself label all four mountains in Aspen?

A. No. It only labels Aspen Mountain, Buttermilk, and Snowmass; and the prices on the lift rates and ski school rates on the back only pertain to those three mountains.

Q. All right. How many people would you say would see that brochure?

A. I'm trying to remember.

Q. How many you produced?

A. How many we produced? Yes. As I remember it, we just about sold out on it. I'm sorry. I have minor blocks in my brain today. I am guessing.

Q. That's all right.

A. I am guessing about 250,000.

Q. Now, you mentioned a film that was produced. Was there a film produced after the elimination of the four-area ticket that you are familiar with?

A. Oh, yes, the Buddy Hackett film.

Q. The Buddy Hackett film? Is there another name for it?

A. "Aspen in January."

* * *

[854] Q. Now, is it true that this movie promotes the Aspen resort?

A. Yes.

Q. Is it true that this movie promotes only the Aspen resort having three mountains, rather than four mountains?

A. Yes.

* * *

[855] Q. And is it true that this movie was intended to attract people—Dr. Andreasen's Level 3—attract people to come to Aspen?

A. Yes.

Q. Newcomers viewing that movie—how many mountains would they think there are in Aspen?

A. If all they knew about Aspen was the movie, what they saw in the movie, I assume they would just assume there are three of them.

* * *

[857] Q. Now, what is the theme of that brochure?

A. It's called "Mountains of Fun."

Q. Is that the whole thing?

A. "Aspen" is the headline. "Mountains of Fun." The [858] mountains are fun are featured in three sections, one of which is devoted to Aspen Mountain, one to Buttermilk, and one to Snowmass. There is some other material in the brochure. including a four-mountain map; but only Aspen, Buttermilk, and Snowmass are identified.

* * *

[859] Q. Why don't you identify that directory?

A. This is the Skier's Directory for 1981.

Q. And who publishes that directory?

A. I believe this is the one that is published in New England—Rhode Island, as I remember. It is meant for national distribution. You have to buy this publication or subscribe to it or a annual basis, but there is only one publication.

Q. All right. Is that a publication—or publications [860] like that which the Aspen Skiing Corporation have utilized previously for national advertising?

A. Yes. We used this several years.

Q. Now, is it true that that particular advertisement again shows the map with four mountains?

A. Yes.

Q. And is it true that that again labels three mountains?

A. It omits Aspen Highlands.

Q. Where is the Buttermilk label on that ad? Can you identify which mountain?

A. It's right in the middle of the page. It is centered with Aspen Mountain on one side, Snowmass on the other, and it comes roughly over both Aspen Highlands and Buttermilk.

Q. Now, a newcomer that would get that publication on the national market, perhaps thinking they would come to Aspen—do you think it would be possible that they would think that Buttermilk included Aspen Highlands?

Mr. PALMER: It calls for speculation.

THE COURT: The objection is sustained.

Q. What would you think, looking at that magazine, if you had never been to Aspen before?

A. Having been involved in Aspen promotion for many years I wouldn't give that one a second thought, because it's quite obvious this is a rather large valley between the two of them.

• • •

[862] Q. Do you recall whether you communicated to Aspen Highlands that you intended to change the airport sign that we have seen?

A. I really don't remember. Probably not. I would really have to search my memory on that one.

• • •

Testimony of John Thorbeck

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[871] Q. At the time that this study was done, do you recall whether or not the Aspen Skiing Corporation offered a three-day ticket?

A. Yes, they did.

Q. Now, the second paragraph of this page says, "Those Aspen skiers who perceive value in avoiding lift ticket lines would be willing to pay a premium for a ticket which provides that service. By creating the three-day pass, ASC cannibalizes customer purchases of the higher revenue six-day tickets."

Do you recall that particular statement?

A. Yes, I do.

Q. And do you recall the recommendation as a result of that that the Aspen Skiing Corporation eliminate the three-area ticket?

A. Yes, I do.

• • •

[873] Q. Could you identify for the jury what Blackcomb is?

A. Blackcomb is 70 miles northeast of Whistler Mountain—or northeast of Vancouver, next to Whistler Mountain, which is a resort that's been there for many, many years. It was just opened this past year, and the partner—the owners of that resort are a Federal Government agency in Canada, 50 percent, and Fortress Mountain resorts, which is one of our subsidiaries. So it's a joint venture with a Canadian Government agency.

Q. And it is true, is it not, that Aspen Skiing Corporation is a 50-percent owner essentially of the Blackcomb resort?

A. That's right—of the mountain operation.

* * *

[874] Q. Mr. Thorbeck, Whistler has a joint ticket arrangement, does it not, with Blackcomb—or Blackcomb has a joint ticket arrangement with Whistler—or am I getting it confused?

A. I believe they did this year.

Q. There are two mountains, are there not?

A. Yes.

Q. One is owned by the entity which you have an interest in and the other one is owned by a completely independent party. Is that correct?

A. That's correct.

Q. And there is an interchangeable ticket available on a six-day basis. Is that correct?

A. There is an interchangeable ticket available, but I don't know the details of it.

* * *

MR. MAYWHORT (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[888] Q. What, if any, effect would Aspen Skiing Corporation's refund policy have upon a skier's ability to ski at Aspen Highlands if he or she so chose?

A. Well, I think that it would probably encourage it. We are one of the very few areas that refunds unused portions of tickets; so if someone bought the six-day ticket and had realized that they wanted to ski Aspen Highlands, they are not really stuck with that six-day ticket. They could come in to [889] the ticket window and have the unused portion of the ticket refunded. I am not an expert in

ticket availability in the ski industry, but I know that there are very, very few resorts that kind [sic] of a service.

* * *

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[890] Q. The question again is on those [891] tickets which are sold through tour operators so that there is a commission involved, do you know whether or not that commission is subtracted first before a refund is given?

A. That commission is not. When that refund is given, to the best of my knowledge we absorb that commission.

* * *

[895] Q. But isn't it true that one of the things that the Aspen Skiing Corporation has been marketing, both before and after the limination [sic] of the four-area ticket, is the Town of Aspen? That's part of the skiing experience, isn't it?

A. It's part of the resort experience.

[896] Q. It's part of the Aspen resort skiing experience. Isn't that correct?

A. That's right.

Q. And the town existed before the Corporation, didn't it?

A. Yes, it did.

Q. Are you familiar with how the Aspen Skiing Corporation acquired its dominant position in the Aspen market, for example, in terms of the number of mountains?

A. Yes, I am.

Q. Do you know, for example, that in 1964, Buttermilk was acquired by the Corporation?

A. Yes.

Q. And you know in 1969, the permits at Snowmass were acquired and that area was developed by the Aspen Skiing Corporation?

A. Yes.

MR. MAYWHORT: Excuse me. I believe that was 1967 on the permits. You said 1969.

MR. TRAUTMAN: I'm sorry.

Q. (By Mr. Trautman) '67—is that your understanding that in 1967 the Aspen Skiing Corporation acquired those permits and developed Snowmass?

A. Yes.

* * *

Testimony of Dante Stephensen

MR. MAYWHORT (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[993] Q. You are aware, are you not, that you could buy the six-day, three-area package from Aspen Skiing Corporation, ski one day at one of the three mountains that are owned and operated by Aspen Skiing Corporation, and then take back that ticket and [994] obtain a refund.

A. A refund? Aspen Mountain has a ticket with a refund on it?

Q. I am asking you. Are you aware of that?

A. No, I'm not. If you ski three days on a three-day ticket, there is no more ticket.

Q. On a six-day ticket.

A. One a six-day ticket? No, I am not aware of that. If that is part of the program, then that has not been

conveyed by the public relations or marketing people to the ski clubs, because it always comes up and it came up last year because last year 89 of my members or so on the trip bought the Aspen Mountain package and one of the frustrations was—you know—"Why can't we ski Highlands?"

"Well, you can."

"How do we do it?"

"Well, you go out and buy a one-day pass."

"What about the six-day consecutive?"

"Well, you can't turn it in."

I have not been under the impression that you can turn it in.

* * *

Testimony of Betty Beaco

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1001] Q. Do you have any experiences as a lift operator with skiers regarding the existence of those two tickets?

A. Yes. There was some confusion on those tickets. We had some three-area tickets that people would come up with those that thought they were the four-area ticket, and we would have to explain that they were just the Ski Corporation ticket and were not good on our mountain.

Q. How frequently did you encourter that in the 1977-'78 season?

A. It was quite frequent.

Q. On a weekly basis, what would be your estimate?

A. Oh, I would say weekly around 10 people with the Aspen Skiing Corporation ticket.

Q. Now, in the 1978-'79 season, did any similar—1978-'79 being the year in which there wasn't a four-area ticket available—did any similar problems occur?

[1002] A. Yes. We had quite a few more people coming up with the Aspen Skiing Corporation ticket believing that they were the four-area tickets.

Q. Did they explain their belief to you in any fashion?

A. Yes. I would explain to them that that was not our ticket and it was not good on our mountain. They would say, "But we have a four-area ticket."

I said, "We don't have a four-area ticket this year."

They said that they were told it was a four-area ticket.

Q. And you mentioned that there were more people in that year than the year before. How many more would you estimate?

A. I would estimate probably around 20 people a week would come up.

Q. Was anything done on the part of Aspen Highlands to try to clarify the confusion?

A. We would tell the people about the tickets. Later on, they had printed up a little notice for the lift operators to hand to the people to verify that their tickets were not good on our mountain.

Q. Have any similar problems appeared in years after the '78-'79 season?

A. Well, every year we would have some people come up with Aspen Skiing Corporation tickets. They would be people [1003] that had skied when we had the four-area ticket, and they hadn't skied since then. They would come up and want to ski the mountain with the Aspen Skiing Corporation ticket.

• • •

Testimony of Walter Tingley

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[1012] Q. You mentioned that Ski International was a tour wholesaler. Could you elaborate upon what the role a wholesaler plays in the overall ski tour industry is?

A. Yes. In the travel industry you have two echelons of suppliers, or two—The organization of marketing is such that you have a supplier level. That supplier can be defined as an airline providing an airline seat, a bus company like Continental Trailways, for example, providing a bus seat between an airport and a ski resort. A ski resort itself is to be broken down into subgroups of the lodging community and the uphill transportation company or the ski mountain. That supplier is the initial—those suppliers and examples of that are the initial suppliers of the raw product.

[1013] A wholesaler in the travel industry is a person who takes those raw products from the initial supplier and packages them as a marketing arm extension into its own package and offers it in the marketplace.

So if I may use an example, if you have a wholesale grocery store, the wholesale grocery store will represent any airline or any ski resort. A wholesale ski tour operator such as Ski International—excuse me—this is a wholesale grocery distributor, while the Safey [sic] Store is the retail point of purchase, whereby the person purchasing groceries buys their groceries off the rack.

Using the same analogy, the ski resort and the airline wholesaler are offering products through the travel agent market or travel agent community. There are 20,000-plus travel agencies in the United States, Canada, and Mexico, that sell wholesaler packages, not just skiing but to any destination in the world. They perform that function. So

Ski International is a company that gathers and manufactures a product using the raw product of the supplier—in this instance, of the ski resorts and the ground transportation companies—and offers it through the travel agent community to the general public vs. going directly to the public and retailing such as a retail travel agent would do.

Q. So that in your analogy, the travel agent would be equivalent to the grocery store?

[1014] A. Absolutely.

Q. Could you describe the ski packages that Ski International puts together and markets in this framework that you described?

A. If I can explain it by comparison again, it's a two-edged sword in our business. The supplier is our major competitor as well as our supplier; so we are basically marketing effectively against the ski resorts who have their packages—their own packages generally, a lodging a lift ticket package in the marketplace, let's say tied up in a blue ribbon, while Ski International takes that same lodging and lift ticket and adds to that ground transportation, most particularly in our package with a rental car about 90 percent of the time, and trip cancellation insurance as well as some other what we call give-aways or promotional items. Thereby we wrap our package in a yellow ribbon so that effectively we are offering a full-service package to the client purchasing from the travel agent that picks up on his arrival in the gateway airport vs. arrival in the ski resort, which is generally what the ski resorts offer and the lodging communities offer.

* * *

[1023] Q. Now, the package that you offer now to the skier that we have been talking about—what does it include in the way of ski lift tickets?

A. It currently includes the Aspen three-mountain lift ticket.

Q. The Aspen Skiing Corporation?

[1024] A. Aspen Skiing Corporation three-mountain lift ticket—three-area lift ticket. A lot of interchangeable terms are used for it.

Q. And that's a six-day ticket?

A. I offer a four-day package—a four-night package, but it is generally in Low Season, and Aspen is not an appropriate destination for four nights. It is too expensive and too difficult to get to, and generally speaking for the weekend skier, which is what the four-night package is aimed at, it does not apply.

Q. Are there other reasons why Aspen tends to be a week-long destination in your experience?

A. Aspen can support a week-long vacation as well as or better than any other resort. It was probably the first to point out to a lot of ski areas developed later that it could support a week's vacation.

Secondly, through the years it has developed that you can't get anything but a seven-night package during regular season because of the accommodations going from Saturday to Saturday time of arrival to departure schedule.

* * *

[1025] Q. You mentioned that your package includes the Aspen Skiing Corporation six-day, three-area lift ticket. Have you had any experience with any customers who as part of that package will drop one day of the dates that they are buying through that lift ticket and purchase daily lift tickets elsewhere?

A. Let me ask you this way: If you had $22 in cash—a 20 and two ones on a string around your neck—would you take it off and throw it away? The answer is no. That's effectively what happens. That's for next year's rates, as I understand it. They were 18 this past year.

* * *

Q. So you were putting together Aspen packages during the periods from 1973-'74 to 1977-'78?

A. Correct.

Q. What ticket did you include in that package at that time?

A. The four-mountain lift ticket.

[1026] Q. And do you recall in 1977-'78 that there was both a four-mountain ticket available and the Aspen Skiing Corporation three-area, six-day ticket available?

A. I do not recall that, but it is a moot point. I wouldn't have been interested in the three-area ticket for all the reasons I have said. Our philosophy is that we are giving—in order for us to offer Aspen and to offer it consciously as a premier ski resort, our clients should be offered all of the terrain. Therefore, we would never consciously consider offering a three-mountain ticket if there were a four-mountain ticket available.

* * *

[1028] Q. During the time that Ski International was marketing packages with a four-area ticket, did you ever have occasion to make recommendations to purchasers regarding the various mountains in Aspen or the various skiing experiences or support services available in Aspen?

A. Only with relation to the ski school at Highlands.

Q. What were those recommendations?

A. We had always done extremely well because through the development of my company we at one time exclusively handled some ski clubs on a contract basis and we had always done very well and had excellent success with the ski school at Aspen Highlands, the GLM, Graduated Length Method and the way they did it. Effectively when there was the confusion of the three- and four-area and not

having it available and the one-year transition in there and since that time, we are effectively precluded from recommending Highlands Ski School.

What we used to do was recommend at least the first day or two at Highlands on the ski school and then recommend that the people go ski the other mountains just so that they could see what they were like for their next trip. Aspen Highlands has not received any business from us through their ski school or on the mountain since the four-day lift ticket— [1029] excuse me—the four-mountain lift ticket was discontinued.

In my opinion, the four mountains, I feel, as Mr. Stephensen did—the four mountains in Aspen are strictly a subjective qualitative determination of what one is best. That's got to be determined by each individual skier based on what he likes to do. It is in the eye of the beholder, whether one is better than the other.

* * *

MR. MAYWHORT (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1044] Q. What I am getting at is that you referred to Mr. Stephensen's testimony concerning an injury.

A. Yes. What I am saying to you is I know that you can get a refund for certain injuries. Okay? He happened to say that he thought it was tough luck. I have never had that problem. I could always do that given some injuries; but never have I been told, nor has the information been made available in all of the materials I receive every year from Aspen Skiing Corporation—okay?—that the ticket can be refunded; that it is optional and can be refunded for the daily amount—any unused days. In fact, to the contrary, it is my understanding that there were six-out-of-seven con-

secutive days or six-out-of-six, depending on the year and which way the wind was blowing and that that was absolute; so that's the premise that I have operated under.

Certainly I will answer your question in summary and [1045] say if I knew that, it would be a factor in considering my conscious decision to make a choice of lift tickets. It is not an acceptable solution to the four-mountain lift ticket, however, in my opinion.

• • •

Q. Now, you also had a few things to say about Aspen Highlands Ski School and that at a certain time in the past, at least, you had recommened [sic] the ski school in particular to your [1046] clientele.

A. Right.

Q. Do you recall that that was at a time when Mr. Lefty Brinkman ran the ski school?

A. No. I never knew any of the ski school operators.

Q. So that name doesn't ring a bell?

A. I know that's where my wife learned to ski, and I was very satisfied with it and saw what she did, and she couldn't walk and chew bubble gum at the same time before she did it. It impressed me.

As a result, I could see that the person—I am in the business of promoting skiing. I don't care where they go. That's the difference between a ski resort and me. If a person has a good skiing experience. I don't care where it is. I have no allegiance to any ski resort. I have an allegiance to the concept of providing access for as many people in the world who have the means to have a good ski experience—the financial means—to provide that as best I can, even if I don't get the business, because eventually it can only benefit me by the shear [sic] weight of numbers.

One of the factors in Aspen that gave rise to our interest in Aspen was the fact that I had excellent feedback from people who went to the Highlands, went through the Highlands GLM Ski School.

• • •

Testimony of Russell Frasier

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[1052] Q. Now, again focusing your attention on the '78-'79 season when you were offering both the Aspen Skiing Corporation three-area, six-day ticket and the Highlands Adventure Pack, did anybody—did any problem develop with respect to refunds on the Aspen Skiing Corporation three-area, six-day ticket?

A. We experienced some problems, yes.

[1053] Q. Could you describe those for the jury?

A. The problems we experienced were that the tickets that we sold to the customers through a package, the customer perhaps did not ski at all or did not ski a full six days, presented the ticket for a refund to the Aspen Skiing Corporation. Some of the customers apparently were told at that time that they may be able to receive a larger refund from us as Aspen Reservations because as I understood it, Aspen Skiing Corporation was deducting a service charge which was comparable to the commission that they paid us.

Q. And what would happen to those customers during the '78-'79 season?

A. Well, those customers would come back to the Aspen Reservations address after going to the Aspen Skiing Corporation and demand, perhaps, a larger refund.

Q. What was their state of mind, to the best of your recollection?

A. Well, I would say most of them that we had were probably not too happy about having to go to two separate locations. They also perhaps were not happy about receiving or being denied a larger refund by the Aspen Skiing Corporation than perhaps they were to receive from Aspen Reservations.

Q. Now, did you attempt to resolve that problem with the Aspen Skiing Corporation?

A. Yes, I did.

[1054] Q. Could you tell the jury what you tried to do?

A. Well, I attempted to try (1) not to discriminate and have the Ski Corporation discriminate between the ticket we sold a customer and perhaps a ticket that they sold a customer. If that was unacceptable to them, I was hopeful that we could work out some book accounting entry that they perhaps would go ahead and refund the customer directly; and if they needed to assess a service charge to do that directly to us.

Q. Were you able to work that arrangement out?

A. No, we were not.

* * *

Testimony of Arthur Bowles

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1072] Q. It's true, isn't it, that the popularity of the Ski the Summit and the sales of Ski the Summit lift ticket coupon booklets by Breckenridge has increased significantly during that period of time.

A. Yes. Since I have been there, it has, yes.

* * *

[1073] Q. Now, as I understand it, one of the primary functions of Ski the Summit is a market tool to attract destination skiers to Summit County. Is that fair to say?

A. It sure is, yes.

Q. And then it's true that once a skier is in Summit County, the competition for their business takes place almost exclusively between and among the four ski areas that are located in Summit County. Is that correct?

A. Yes, it does.

Q. And the way that the Ski the Summit itself operates is to provide the skier with a coupon book in exchange for the price that the skier pays. Correct?

A. Yes. That's right.

Q. And the coupons from that book are then exchangeable at any of the ski areas for a daily lift ticket?

[1074] A. Yes.

* * *

Testimony of Jerry D. Jones

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1100] Q. Certainly. The question is if you were to take all of the skiers that come to Summit County in a typical year, what portion of those skiers go to Breckenridge, what portion to Keystone, what portion to Copper Mountain?

A. Again, last year is not a very good year to make that judgment. The '79-'80 year is not good, and I can't quote specifically; but I can give you round figures. I think that Breckenridge had 712,000 skier days; Keystone had 645,000 skier days; Arapahoe Basin had 214,000 skier days, and

Copper Mountain had 638—no, 612—612,000 skier days at Copper Mountain. I am not sure about Breckenridge—714,000. I'm not sure.

* * *

[1104] Q. And have the purchase of Ski the Summit books increased—coupon books have increased over that period of time?

A. Yes.

Q. Does Keystone offers its own one-area, six-day ticket that's good only at Keystone?

A. Yes. We do offer that; but that is an option on your package. We offer the Ski the Summit ticket as our primary package.

Q. Has that Keystone-only, six-day ticket met with any particular marketing success?

A. Not since the awareness of the Ski the Summit program has grown. Our individual ticket sales have decreased every year.

Q. Has there ever been consideration given to allocating revenues from Ski the Summit program—coupon book sales revenues on the basis of some fixed percentage share?

A. No.

Q. On the basis of historical market share?

A. No.

Q. Such a concept has never been proposed by Breckenridge?

A. Not that I know of. I don't believe there is any need for that, because we do have an accurate accounting of our [1105] ticket sales the way it is now.

Q. Would you agree to that kind of system if it were proposed?

A. No.

Q. Why not?

A. I think that each individual area markets individually as well as cooperatively with Ski the Summit; and if there is any—at any one time an individual area could increase their sales significantly; so it would not be equitable at that time.

* * *

Testimony of Ted Farwell (Out of the presence of the jury)

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1154] Q. Mr. Farwell, you also testified in your deposition that a critical assumption of support in your Method A is that all four ski areas have equal quality in the eye of the consuming public.

A. As a group, yes, they are of equal quality. Just because Snowmass is the best in the world doesn't mean that Highlands isn't like next door.

* * *

(In the presence of the jury)

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1176] A. We looked at originally—looked at the visits from 1966-'67 through 1979-'80, as reported to the U.S. Forest Service and Colorado Ski Country U.S.A.

Q. Did you subsquently look at '80-'81?

A. Yes. Later.

Q. Now—

A. This was in January.

Q. Why did you not use information prior to '73-'74?

A. Well, there were several reasons for discarding the earlier information. One reason is that the Aspen Highlands skier visit count that was presented to the Forest Service and Colorado Ski Country was inconsistent with their ticket audits. After looking over their ticket audit information, which occurred from 1973 forward, we adjusted each one of the years during that period. Therefore we felt that the data earlier, where there were no ticket audits, was unrealiable data.

The second reason for not using data prior to '73 was that the marketing practice—the four-area interchangeable ticket was not in effect prior to '73.

The third reason was that there had been a lot of changes in the capacity of the Aspen ski areas in the period prior to '73. Some new lifts were added at all of the ski areas, most especially at Snowmass and at Highlands; but every area had some new lifts.

[1177] Q. What difference did that make in the statistics prior to '73-'74?

A. Well, while it would not have an effect on skier visits per se, it would have an effect on the market share. You would expect market share to change somewhat is [sic] the capacity share is changing.

* * *

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

BEST AVAILABLE COPY

* * *

[1219] Q. Right; and you've indicated that one of the assumptions that's important to you on this is the assumption of equality among the areas.

A. Yes.

Q. By that do you mean that the areas are equally desirable in the mind of the consumer?

A. I guess that's true.

* * *

[1303] Q. And the marketing of oh, for example, the multi-day tickets that you have talked about—six-day tickets—is typically directed at the destination skier, isn't it?

A. Absolutely.

* * *

[1340] Q. Now, Mr. Farwell, isn't it true that Aspen Skiing Corporation is widely regarded in the skiing industry as one of the best managed and most well-run ski areas in the country?

A. I'd say that's correct.

* * *

[1344] Q. Now, turning to Snowmass, Mr. Farwell, isn't it true that you regard Snowmass as the premier ski resort in the world?

A. Yes.

Q. In your opinion, in the mind of the typical vacation skier, is Aspen Highlands comparable to Snowmass?

A. The balance at Aspen Highlands and the balance at Snowmass are both comparable.

* * *

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1358] Q. Now, why have you utilized skier visits which have daily tickets, three-day tickets, and all of those other tickets in them for purposes of this analysis?

A. Well, the loss that we are showing is not only a loss in the four-day ticket but it is really a change in the whole ticket structure to the Highlands ski area over the period. For instance, if we are saying that Highlands lost—and again we will use an example—that Highlands lost 14,000 skier visits in 1977-'78, they actually lost a lot more than that from the four-area ticket, but there would have been other tickets that weren't purchased so that the mix would have been a lot different mix than they actually achieved for that year.

Q. Does the lack of the four-area ticket impact in your view on the sales of daily tickets at Aspen Highlands?

A. Well, yes, it is different. In some cases I am sure that a daily ticket buyer would have bought a four-area and in other cases I think it was testified earlier that when you come in groups that some people might be buying single tickets at Highlands if the multi-area ticket user that was in that group decided he could go to Highlands that day—or at least that was a possibility.

* * *

Testimony of George H. Lloyd

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1399] Q. Okay; and in subsequent years, '79-'80 and '80-81, what conclusions do you draw generally with respect to your total operating expenses?

A. In general, I think the numbers that are reflected there reflect our response to that dropoff in skier volume.

* * *

[1401] Q. What about advertising? First of all, what does that include?

[1402] A. Advertising includes publications in national magazines, in local advertising, radios, and so forth, as indicated previously by Bill Comstock and Peter McMahon.

Q. I notice that here you went from 126,000 to about 140,000 in '78-'79 and then dropped off to about 84,000 and then 85,000. What is the explanation for that?

A. '78-'79, we did substantial amounts of advertising—of marketing for the Adventure Pack on a national level—Ski Magazine, Powder Magazine, Skiing. In the following years with the budget restraints, we did not go into as much national advertising.

Q. Why is that?

A. Well, in looking at the results of the national advertising we did, I think as Bill Comstock stated the areas that we advertised on those national magazines was—we advertised Aspen—the resort of Aspen—all four areas of Aspen. We advertise the Adventure Pack, our concept of the four-area ticket, and we advertised ARI, the Central Reservations system. The number that we used in all those ads was 925-4000.

In looking at the result of those ads, the sales of our Adventure Pack through Aspen Reservations was only about $33,000 in gross sales.

Q. And how much did this national advertising campaign for Aspen, the Adventure Pack, and ARI cost approximately?

A. In the neighborhood of $75,000.

* * *

[1422] Q. Now, Mr. Lloyd, what effect does the individual daily lift ticket price of the Aspen Skiing Corporation have upon the economic feasibility of the Adventure Pack?

A. Well, when you have to pay your competitor the full daily rate, it's very hard to price that package, especially when you compare it to the other option, the three-area ticket. You have to still be competitive with the Aspen Skiing Corporation three-area ticket.

* * *

[1424] Q. Now, has the management of Aspen Highlands made a decision as to whether or not the Adventure Pack will be offered for the '81-'82 season?

A. No final decision has been made at this point in time.

Q. Now, does the daily lift ticket price announced by the Aspen Skiing Corporation of $22 have any impact upon that decision?

A. Very definite impact.

Q. Could you explain that, please.

A. Well, it just is not reasonable in my mind to receive $10.30 during High Season and pay for skiing at the other areas of $22. In Low Season, it even becomes less feasible to receive $3.50 and to pay your competitor $22 for his lift tickets.

[1425] Q. Do you have an opinion, Mr. Lloyd, as to what these economics look like in your view for next year?

A. In my view, yes.

Q. What is that?

A. I would say that the Adventure Pack is a thing of the past. It will not continue.

Q. If there is no Adventure Pack next year and no four-area ticket, do you have an opinion as the continued financial viability of the Aspen Highlands Skiing Corporation?

A. Yes, I do.

Q. What is that opinion?

A. Well, I think without the Adventure Pack, without a four-area ticket, basically Aspen Highlands becomes a day ski area in a destination resort.

* * *

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1436] Q. What percentage do you suppose of your Adventure Packs were sold to tour operators?

A. Approximately 50 percent.

* * *

[1449] DEFENDANTS' MOTION FOR A DIRECTED VERDICT

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1453] Secondly, Judge, we believe that there is no evidence of monopoly power in this case. There is no evidence that the Aspen Skiing Corporation has the power, in our view, to control price or to exclude competition as those terms are defined by the cases. The pricing decisions by the Aspen Skiing Corporation are first of all subject to scrutiny by the Forest Service; but secondly—and I think most importantly—they are subject to the competitive pressures of Vail, Utah, Steamboat, and that's why the destination ski resort market is the relevant market.

Now, on the power to exclude competition, the evidence so far is that ski areas both in Colorado and elsewhere are expanding. Nothing that the Aspen Skiing Corporation can do can prevent that; and in fact, there is anticipated on the near horizon a very major expansion in Aspen itself, the Little Annie ski area.

Under the cases of *Telex* and *Berkey Photo* and the many [1454] other cases that we cite in our brief, a company like Aspen Skiing Corporation is required to compete. It is required to make independent decisions. It is required to price its own product. It is required to make its own determination of the ticket that it chooses to offer and the tickets that it chooses not to offer.

* * *

Testimony of David R.C. Brown

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1467] Q. Now, were you involved with the Aspen Skiing Corporation at the time that it was formed?

A. I was. I was one of the original investors in the company and a director from its start.

Q. Where did the company first build any ski lifts on Aspen Mountain?

A. The first two lift [sic] on Aspen Mountain opened for business on the last day of December, 1946, I believe it was.

Q. It was two lifts, you say?

A. There were two single chair lifts with a combined [1468] capacity of about 400 people an hour.

Q. Had you added some trails to the mountain?

A. At that time?

Q. Yes.

A. Yes. There was one trail cut prior to the opening—one additional trail other than Roach Run, which was the original trail there.

Q. Could you just briefly describe first the next five or ten year history of the company?

A. Well, for the next, I would say, nearly 10 years, we saw a gradual but steady increase in the number of people coming to Aspen to ski; and our biggest problem was trying to build facilities to keep up with the demand that had been created. We started with a very small capitalization, and we had to continue to borrow money and put back everything that we made from the operation into improving and expanding our facilities to accommodate the number of new people that were coming to town. There were a great many new lodges and restaurants and this sort of thing opened up during that period which catered to the public, and we were hard-put for many years to avoid having long lift lines.

* * *

[1469] Q. Did the company add lifts during that first 10-year period?

A. They did.

Q. Do you recall generally what kind of additions to lifts there were during that time?

A. Well, the first lifts that they added was a T-bar on what is now called the Little Nelle slope. They then built a lift we called No. 3, which served the upper part of the mountain and the easier part. Then following that, the T-bar was taken out and a chair lift, which was called No. 4

Lift—placed on Little Nelle; and then still I think within that first 10-year period No. 5 Lift was built, which connected with the upper part of the No. 4 Lift and went on up to higher slopes on the mountain.

Q. So as of about 1956, approximately how many lifts were you operating on Aspen Mountain?

A. Five lifts, I believe.

• • •

[1476] Q. Did the Aspen Skiing Corporation then pursuant to this agreement with Janss—Mr. Janss—develop lifts at Snowmass?

A. They did. We opened with five lifts, and we have continued to build lifts there as the demand and economic conditions warranted it.

Q. How were those lifts paid for?

A. Mostly out of cash flow and borrowed money.

• • •

[1478] Q. Now, turning from the question of Snowmass, Mr. Brown, we have heard some testimony in this case about the buses in Aspen and that Aspen Highlands has a fleet of buses of their own. Does the City of Aspen provide bus service for skiers?

A. They do, but it is paid for by the Aspen Skiing Corporation under a contract arrangement with them.

Q. Do you have a feel for the kind of support that the Skiing Corporation gives to the bus system?

A. Well, it's a good many hundred thousand dollars a year that we pay them to run these buses; but we find that it's more desirable than doing it ourselves, and it also gives the city buses for other uses in the off season.

Q. Does the Aspen Skiing Corporation participate in other ways in supporting the community?

[1479] A. Yes. We have participated a great many ways over the years. We subsidized—I don't know if that is the correct word—but made substantial payments to the airport authority in its early stages to get the airport expanded and improved. We gave, I think it was—I don't know the exact sum, but it was a large sum for the construction of a new hospital. We have provided a free ski school to the local children over the years along with children from neighboring communities, and we also give tickets—ski lift tickets to a group of local people who have done outstanding community services—and we do not kick [sic] these people. There is a Board that we have nothing to do with that designates who they feel should receive the tickets each year, and it's people like the Gray Ladies that work in the hospital and the women that run the thrift shop and some of the nurses—anybody who offers their service to the community.

• • •

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[1505] Q. And the Aspen Skiing Corporation did not orginally develop the Buttermilk Skiing Corporation, but it was acquired. Is that correct?

A. We acquired it and then added substantially to it.

Q. Okay. Now, you mentioned some—I believe with respect to Snowmass that the Janss Company had acquired the private land at the base of Baldy Mountain in the early 60's, with a view toward developing a ski area. It that generally correct?

A. Yes, it is correct.

Q. And did they also at that time acquire certain Forest Service permits which would familitate [sic] the skiing on that mountain?

A. They acquired, I guess, a temporary permit subject to validation when the area went into operation.

Q. Well, isn't it true that some of the touring that you were talking about previously was also performed under a permit held by Mr. Janss?

[1506] A. Yes.

Q. And that permit was not held by the Aspen Skiing Corporation.

A. Not at the time.

Q. And is it also true that Mr. Janss later acquired a conditional permit to open a ski area at Snowmass?

A. I think that what we were operating under during the tour period was his conditional permit.

Q. Okay. After the tour period, didn't he later on obtain another permit?

A. Yes. He obtained a regular Forest Service permit for a ski operation.

Q. Again, that was not obtained by the Aspen Skiing Corporation?

A. It was obtained by the Janss Corporation and assigned to us.

Q. And it was assigned to the Aspen Skiing Corporation to facilitate your construction of lifts, etc.; is that correct?

A. That's correct.

Q. Now, you mentioned just recently in your direct testimony that one of the reasons you wanted to go your own way was with respect to this three-area, six-day ticket—was that you felt that it was a very desirable ticket. Is that correct?

A. I felt that a package is a very desirable thing for a [1507] tour agent to sell.

Q. And isn't it true that what put the Aspen Skiing Corporation in the position to offer three mountains was the fact that you had acquired Buttermilk and that you had acquired the permit at Snowmass?

A. Certainly. If we didn't have three mountains, we couldn't offer a three-area ticket.

Q. Now, you mentioned some buses—I think that you said that the Aspen Skiing Corporation paid for that ran out to Snowmass. Is that right?

A. Both Snowmass and Buttermilk.

Q. When did the service to Buttermilk begin?

A. I don't remember exactly, but shortly after we acquired the Buttermilk ski area.

* * *

Testimony of Arthur Pfister

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1525] Q. Could you describe for us, Mr. Pfister, and for the jury the history of your involvement in the Buttermilk ski operation?

A. In early 1958, Friedl Pfeiffer and I decided on our adjacent ranches, which we had owned previous to this endeavor, to build a ski area.

In those days—it was a year before D.R.C. was President of the Skiing Corporation—and I was a director at [1526] the time. They didn't have the money. They didn't want to expand, but Friedl owned the Aspen Ski School, and he had no place to teach beginners and intermediates; and so we decided that the ideal place would be to build

Buttermilk. As a director of the Skiing Corporation, I strongly urged the Aspen Skiing Corporation to do this. However, our President at the time wasn't very enthusiastic about skiing, and we weren't making any money. So Friedl and I went ahead with the project. We each owned 40 percent of it. Billie Ruby had 15 percent, and Fred Islan had 5.

* * *

Q. How long did you and Mr. Pfeiffer operate Buttermilk?

A. The dates—I might be off one year, but I think we operated as a partnership. We operated for three years, and on the fourth year, we decided to build a—we finally got a Forest [1527] Service permit to go all the way up to the top. We were going to put in a double chair on the upper section, and Friedl and I had some rather violent arguments about where the lift should go and what kind we should buy. So it came down to the point where we had a buy-and-sell agreement.

I said, "Friedl, I want to buy you out"; so that afternoon he came with a check.

He says, "I want to buy you out." His check was 15 percent more than mine was. I didn't know until after I received the check that it was from Robert O. Anderson; so Mr. Anderson wasn't in on the deal the first three years, but he managed to survive with Friedl one year and then they all sold out to the Skiing Corporation. So I wasn't in on the stock deal. I took cash, but Robert O. Anderson and Friedl both took stock in the Ski Corporation.

* * *

[1528] Q. Could you describe for us just briefly the history of the Buttermilk operation, beginning in 1960, let's say.

A. Well, we struggled along, and they put in that double chair on the top section the year after I left them.

Then as soon as the Aspen Skiing Corporation bought it, they took the T-bar off the base—the large T-bar and built a double chair in [1529] place of it and took the T-bar and moved it over to the Tiehack side for expert skiing. Gradually they opened up No. 3 Lift on the west and put a base area in there.

Then in 1970, they extended farther down into my ranch and put their Eagle Hill—their small area that connects with the Tiehack Lift.

I must say at this point that I don't—I don't see how I could ever complain about the Ski Corporation percentage to me, because at that point they took over a small percentage of my land without my going to litigation or anything of the sort. In fact, without my knowing it had happened; but they almost doubled my percentage, so I have never really been too unhappy with the Ski Corporation.

* * *

[1533] Q. Do you recall discussions among the directors of the Aspen Skiing Corporation concerning the utilization of the survey to divide revenue on this four-area ticket?

A. Yes. I was always under the impression that the—the least I can say is that they were accurate and I didn't depend on them at all. I have never really been in favor of the four-area ticket.

I am a businessman, and I have never understood why a businessman should help his competitor. I don't want to kill him, but I don't want to help him.

* * *

[1535] Q. Are you familiar that Mr. Comstock has testified in this case concerning this conversation he says he had with you?

A. I remember riding in with Bill, and I probably—I have heard what he said, and I probably did say that

because I figured that Whip would not take a deal unless he had the best end of it.

* * *

[1536] Q. You referred to the question of quality at Aspen Highlands. Does that have any relationship, and if so, what relationship?

A. Well, if Highlands' percentage was going down, there must have been a reason. Our product was going—was improving, because we were adding more money and spending more putting in all these new facilities. That's the only answer to that. We just had better skiing.

* * *

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1546] Q. Okay. Now, is it true that prior to the acquisition of Buttermilk by the Aspen Skiing Corporation that the Aspen Skiing Corporation did not have a good mountain to teach beginning skiers on?

A. The top of Aspen Mountain was very satisfactory; but this isn't a very popular thing with customers to be hauled up a lift to teach; and Little Nelle is a little too steep to teach beginners. That was one of the reasons we had a joint ticket and why Mr. Pfeiffer was able to take part of the ski school out there.

Q. So the purpose of that joint ticket was to take people who ordinarily would ski at Aspen Skiing Corporation but wanted to learn to ski over to Buttermilk, which had a better facility for teaching people to ski; is that correct?

A. True.

* * *

[1552] Q. But in any event, you think that the three mountains of the Aspen Skiing Corporation are superior to Aspen Highlands; is that correct?

A. Yes.

Q. Now, is it true that you have a daughter named Nancy?

A. Yes.

Q. Is it true that she has had a season pass at the Aspen Highlands for the last three years?

[1553] A. She and Mr. Jones are very good friends.

Q. Is it also true that you, in August of 1980, were shooting trap with Mr. Jones and requested that he give you a season pass at the Aspen Highlands?

A. I might have conned him out of one.

* * *

[1554] Q. From your point of view, what did you think was declining?

A. Their skier days.

Q. Over what period of time, sir?

A. I think it was about a four-year period.

Q. What years were you looking at?

A. I think from about '76 on.

Q. '76?

A. '77, and after that, '78, '79, '80.

Q. Do you recall when the elimination of the four-area ticket took place?

A. Yes.

Q. When was that?

A. '78.

Q. Okay. So the decline that you were looking at had to be prior to '78, didn't it?

A. Yes. That's right. It must have been '73 or '74. I'm not sure. I'm not certain about it, but I do remember that when we discussed the numbers at a directors meeting that it was my opinion that their share was declining.

Now, also we speak of quality. We have increased our lift capacity since the four-area ticket went in 70 percent at Snowmass.

• • •

Testimony of Thomas Richardson (Recalled)

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

• • •

[1570] Q. Now, if we—You were here during the testimony of Mr. [1571] Farwell, Mr. Richardson.

A. Yes.

Q. And he indicated that Aspen Mountain had reported a capacity of about 3,000 skiers.

A. Yes.

Q. What does that work out to in terms of skiers per acres?

A. Approximately 600 acres; so that's approximately—exactly five people per acre to have a capacity of 3,000 per day.

Q. And you recall that his testimony was that he had calculated or his projections were based on a density for Aspen Highlands of 11.4 skiers per acre.

A. Yes. It's over twice what Aspen Mountain has.

Q. Now, the green ridge and slope on the right side of that picture—what is that?

A. In this picture?

Q. Yes.

A. You mean this ridge here?

Q. Yes. What is on the right-hand side of that ridge?

A. Aspen Highlands would be over here, but this is Castle Creek going through here.

Q. And what is the wooded area there? That is not part of the ski area, is it?

A. No. The wooded area here is not part of the ski area.

Q. Mr. Richardson, there has been testimony in this case [1572] about the Little Annie development that is underway in Aspen. Where is that project going to be located? Just describe it to the jury and point it out on that map.

A. Okay. The base terminal for the Little Annie—or access to the Little Annie ski area will commence approximately in here, and it will be a gondola, which is a closed cabin, cable lift. I may not have it exactly, but it will start here and go into this area in here. Then I believe there is a dog leg there to the top. This is the skiing area in here.

Q. That's the kind of wide-open-looking area at the upper left of the picture?

A. It's wide open, modern commercial type of area. It is differentiated from this, which is expert terrain; and it is a different kind of mountain; but it is part of the same mountain but it is intermediate terrain. The first phase would develop I don't know how many acres, but they estimate that the carrying capacity or capacity of this area in here is about 4,500. They also plan to expand down the other side.

Q. 4,500 skiers?

A. 4,500 skiers, yes.

Q. Now, Little Annie—when you say it is a modern commercial mountain—could you tell the jury what you mean by that?

A. When you cater to the destination skier, you really don't need expert terrain anymore. 20 years ago, 10 years ago, you needed expert terrain; but most of the mountains that have [1573] come onstream recently cater pretty much to the intermediate skier. The destination skier does not ski a lot. He is not in shape, and they do not enjoy steeper terrain. That is basically a fact, and this is one reason why Snowmass and Buttermilk are so successful—and particularly Snowmass relative to the other two.

Q. Now, on Little Annie, what is the status of Little Annie at the moment?

A. The status of Little Annie, unless some administrative problem comes up, should have an operation '73-'74—I mean '83-'84, and the cost, I understand, is anywhere from 30- to $40-million to develop that ski area.

Q. Has anyone at Little Annie approached you and requested that a joint ski ticket be used?

A. No. We have talked about evacuation agreements, but nothing about tickets.

Q. Have you entered into or negotiated evacuation agreements with Little Annie?

A. About two or three weeks ago, we signed an evacuation agreement.

Q. What is that?

A. The access to Little Annie is by aerial lift; and in case that lift would break down, the people skiing up here would have no way of getting down off the mountain

without skiing down Aspen Mountain. You can't ski down here. It's too steep and [1574] undeveloped; so we, under certain circumstances and conditions—we allow them to evacuate down the front side of Aspen Mountain or off this ridge and on down through Little Nelle.

Q. Now, on the map it looks like the Little Annie project is pretty close to the Aspen Mountain slopes. Is that true? Is it readily accessible as between those two areas?

A. Mr. Pfister was talking about fall-line skiing.

Q. Fall-line skiing?

A. Fall-line skiing. He would have to ski out of the fall-line. You could catwalk between the two areas, but to ski down the fall-line you couldn't do that and ski to Aspen Mountain from Little Annie; but you could catwalk it.

Q. Is it anticipated, then, that the Little Annie skiers will ski the Little Annie and Aspen Mountain skiers will ski the Aspen Mountain?

A. We hope so, unless there is an evacuation. Then they would be evacuated from Aspen Mountain.

Q. Now, aside from the emergency procedure that you have worked out with the Little Annie developers, is there any other relationship between the Little Annie development and the Aspen Skiing Corporation?

A. None.

Q. That's an independent project?

A. Yes. It is an independent project. I have skied back here, and some of the employees have skied there; but we have no [1575] relationship with them.

• • •

[1579] Q. You have referred to fall-line skiing. Is Butter-

milk a good description, a good example, of fall-line skiing?

A. In my opinion, Buttermilk is a good example of a modern mountain, although it doesn't have the size of Snowmass. It is a very modern mountain as far as relating to the commercial skier. It has wide-open slopes, easily groomed trails; but at the same time, it offers a challenge to intermediate. There are short areas or steep short areas and bumps, more or less—large bumps that create anticipation for intermediate skiers, [1580] and they will feel challenged. At the same time, they can handle it very easily, and it really builds their ego and it is a ego mountain, because it is the type of skiing, I feel, that is the future in the ski business. We are in the market—the destination market that we try to service, which requires that kind of skiing.

Now, we also, during the last seven years—we have installed a major snow-making system at Buttermilk, it cost us about $20,000 an acre over 74 acres. We cover this entire area down here.

Q. What additions, if any, have there been at Buttermilk since 1973, the period when Mr. Farwell began to do his projections?

A. Well, we haven't increased the capacity of the area but we have spent a great deal of money, as I said, in snow-making.

We've also made some major lift changes in particularly this lift here. We altered the loading terminal and did some quality-type work in that lift.

There was a restaurant installed over in here during that period with about 200 seats—175 seats approximately.

Q. Have you added some trail acreage at Buttermilk and if so, can you describe that?

A. Yes. The trail acreage at Buttermilk hasn't been much over that. It's been about 7 percent, and it's been this

trail here, this trail here, and I think a trail over here, in [1581] here, called Red Rover.

* * *

[1583] Q. When you say, "operate the mountain," what do you mean?

A. The mountain presently—that is an old picture. It was taken in 1978; but presently Snowmass has 12 lifts. In the summer of 1973 it had eight lifts.

[1584] Q. You mean that four lifts have been added since 1973?

A. Yes.

Q. could you describe those in detail and show the jury where they appear on that map?

A. In 1973, we built two lifts. We built a triple chair lift that was referred to previously. Let me get oriented here. The triple chair lift starts at the base here and goes to about this location.

Q. Would that then be an access lift?

A. Yes, it is an access lift; but it does have some skiing but not a lot. It is mainly an access lift.

Q. Let me interrupt you a moment, Mr. Richardson. What is a triple chair lift?

A. A triple chair lift—it is a chair lift. I think you all know what a chair lift is; but it seats three people instead of two, and it has a higher capacity. This particular lift can handle 1,800 people an hour.

Q. How do three people get on a lift at the same time?

A. Just sit down on it.

Q. They stand in a row of three instead of a row of two?

A. Yes.

Q. Does it have lines of three people instead of lines of two people?

A. Well, there are a number of ways you can do it. You could have lines of three people going in or you can have lines [1585] of two people and then singles. There are a number of ways of doing that.

Q. You were going to describe the other additions to the capacity of Snowmass since the base year of Mr. Farwell's study.

A. No. 8 Lift, which is what we call the High Alpine Lift, was in the same summer and goes to about in here.

Also we started a restaurant in here that eventually built that last summer, and that has a capacity of 700 seats in it.

Then in 1975—the summer of 1975, I believe, we built another lift, which incidentally, I think, is the longest double chair lift in the U.S. It's over 8,000 feet long. It services this area in here, which already had a lift.

Q. The top sort of open area?

A. Yeah. This big open area in here. That has about 1,200 an hour capacity also. Maybe that is a little less than 1,200 an hour, but it goes way up into here.

Q. When you say it has 1,200 per hour capacity, what do you mean by that?

A. That means if the lift doesn't stop and is continually going, the lift will transport 1,200 people from top to bottom in one hour.

Q. This is more skiers than that area can handle, then.

A. Right; and then the last lift that was built—I think it was '78—is No. 12 Lift. That is in here, and that goes to [1586] 11,800 feet and services all this terrain in here.

The vertical transport feet during this period from '73 to 1980—I am talking about summaries—was increased 70

percent during that period, and the VTF is an industry way of measuring the capacity of the lift—the lift capacity of a mountain. It means vertical transport feet—is what it stands for—per hour.

Q. Basically what you are saying is that Snowmass added 70 percent to its lift capacity during that period?

A. That's what the industry standard would use—70 percent. Its lift capacity has been increased 70 percent during that period.

We also increased the trails—the groomed skiable trails by about 23 percent.

• • •

Q. Now, what about the mix of slopes at Snowmass? Can you describe that?

A. Snowmass is a huge intermediate area. it does have some advanced skiing and there are some, I suppose we would call, expert terrain; but it really doesn't have a lot of it. [1587] But the thing about Snowmass that I think makes it so attractive to the tourist is that it's wide open and alpine.

Q. What do you mean by alpine?

A. You are above treeline, and it's a lot of areas in the western part of the United States and also in New England where when they get to the top of the mountain they are very restricted. You maybe have just a narrow trail coming down to service some of the skiable terrain.

But this area is really skiable from top to bottom. It has very few catwalks. It is all fall-line skiing, and I think the ultimate test of any ski area is not what I like or what a particular mountain manager likes. It is what the public likes; and that's what we try to build—is a ski area that the public likes. They tell us what they like; and if they don't like something, we know next time we will try not to do it.

But for example, the people that ski Snowmass—I would say over 95 percent of the people that ski Snowmass are destination skiers. To just show you how they prefer Snowmass or how they like Snowmass, about 83 percent of these people—of the total skiers that ski Snowmass—they ski Snowmass exclusively. They don't ski anywhere else; and I think that just shows it is a popular mountain. It has the largest skier visit numbers of any ski area in Colorado. I think last year—not this year, because of the drought was here along with everybody else—but it was the third most popular ski area in Colorado as far as [1588] skier visits were concerned.

* * *

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[1591] Q. Now, you mentioned that 83 percent of the skiers that ski Snowmass ski there exclusively. Is that correct?

A. That's according to a survey we made.

* * *

Testimony of Kay Taylor

MR. MAYWHORT (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1633] Q. Now, we have heard a lot about one-day tickets and three-day tickets and six-day tickets during the course of the trial. Could you just give me a thumbnail sketch of the various types of tickets that the Aspen Skiing Corporation has sold during the course of its existence?

A. We've always had a one-day ticket that sort of is your basic adult one-day ticket. Then we have had a three-day ticket and a six-day ticket. On occasion we have had a four- and a five-day ticket.

As time progresses, we are always looking for new methods to make the ticket system work better, to make it more convenient for the public; so we are always experimenting with something new.

Q. What exactly is the rationale behind offering any sort of a multi-day ticket when you already have a daily ticket?

A. It's convenience for the customer. If you've come with your family, it makes it a lot easier Daddy [sic] can go to the ticket window and get everybody's ticket at once and get it all paid for. Everybody gets their ticket and off they go. It also [1634] means you don't have to come back every day to the ticket office.

In recent years, it's been the around-the-neck ticket, which if you will look on page 4—those are the tickets that have the elastic string through them, and you just wear them around your neck. We can frequently offer those at a little bit of a discount. Tour operators, travel agents, etc., purchase this kind of ticket in general on package plans so that these tickets are also bought sometimes—or offered on a commission basis.

Q. For how long has the Aspen Skiing Corporation had a multi-day ticket such as you just described, side by side with a daily ticket?

A. Well, we have actually always had a multi-day ticket side by side with our daily tickets since 1948; but as far as it being precisely in this form, that is a more recent development.

Q. Now, going back into the history of the company's ticketing, what was the first year that the Aspen High-

lands and the Aspen Skiing Corporation entered into a joint ticketing arrangement?

A. I think it was in 1962-'63 season.

Q. And how long did that ticketing arrangement last?

A. Through 1971-'72.

* * *

[1645] Q. Ms. Taylor, could you run through very quickly year by year during the period of the 60's and tell me the different types of Aspen Skiing Corporation multi-day tickets that were offered side by side with either the coupons or the around-the-neck joint ticket in '71-'72?

A. '62-'63, we had a three-day and a seven-day. '63-'64, we had a three-day.

Q. Slow down a little bit.

A. And a seven-day. '64-'65, we had a three-day and a seven-day. '65-'66, we had a three-day and a six-day. '66-'67, we had a three-day and a six-day. '67-'68, we had a two-week ticket—two one-week tickets with a High and Low Season price. '68-'69, we had the same thing. There was no three-day ticket offered in either of those two years, nor was there a three-day offered in '69-'70; but there was a vacation special, which was six-day ticket, more like a learn-to-ski week. '71-'72—'70-'71, the only thing offered was the joint ticket. '71-'72, which was the around-the-neck ticket, we had a three-day.

Q. Okay. During this period that there were Aspen Skiing Corporation multi-day tickets on the one hand and a joint ticketing [1646] arrangement of one form or another on the other, how did the sales of Aspen Skiing Corporation multi-day tickets compare with those of the joint ticket?

A. Very well. I think probably about 5 out of those 9 years we sold more of our own than the joint. I think one year it was just about even, and then there were a couple of

years—maybe three years, particularly as you are getting toward the 70's, that the joint ticket was sold more.

Q. Now, you indicated the joint ticket was abandoned after the '71-'72 season. Is that right?

A. Yes.

Q. Was the Aspen Skiing Corporation sued by the Aspen Highlands at that time?

A. I don't believe so, no.

* * *

[1652] Q. So during the 1972-'73 season, what types of multi-day tickets were offered by the Aspen Skiing Corporation?

A. We offered a six-day and a three-day.

Q. Now, what occurred with respect to the ticketing system beginning in 1973-'74?

A. They went back to a four-area ticket.

* * *

[1658] Q. Now during the years of the survey, Mrs. Taylor, what, if any, multi-day tickets were issued by the Aspen Skiing Corporation along with the joint four-area ticket?

A. I will have to refresh my memory.

We had a four-day ticket—a three-day ticket in '73-'74; a four-day ticket that we experimented with in '74-'75, and then again a three-day ticket in '75-'76; a three-day ticket [1659] in '76-'77; and '77-'78, we had both a three-day and a six-day.

* * *

[1661] Q. And I'd like to turn now to refund policies of the Aspen Skiing Corporation. Are you familiar with that overall policy?

A. Yes, I am.

Q. Would you please describe for the jury the current refund policy of the Aspen Skiing Corporation on multi-day tickets?

A. On multi-day tickets? Basically the whole philosophy on it is if you buy a multi-day ticket, if it is offered, it is a convenience ticket and you pay full price for it, which is what our three-day tickets are. Our three-day tickets cost as much as three one-day tickets, $54. If you don't use your three-day ticket for whatever reason, you just walk back into the adjustment office or you mail it to us, and we will refund your money. We can tell whether you have used it or not, of course, because of the punch system.

On the six-day ticket—now those tickets are generally [1662] offered at a slight discount; so what we do is simply refund less the daily price, so that it never costs you any more to buy a ticket—to buy the six-day ticket than it would cost you just to walk up to the ticket window and buy your one-day ticket.

Q. What sort of reason do I have to give to get a refund?

A. You don't have to give any reason.

Q. If I want to ski at Highlands?

A. Fine.

Q. I still get a refund?

A. Sure. People do that.

Q. Have they done it to you?

A. Oh, yes.

Q. And you give them their money back?

A. Of course. We don't require a reason. The only time that we require a reason is on a medical refund. Now, on a medical refund we assume that if you had not been injured

or had not gotten sick you would have used the whole ticket and you would have gotten the benefit of the discount; so on that ticket we do prorate it back to what you actually paid if you used the whole thing—what it would have cost you perday [sic] of skiing. In other words, I think last year in the High Season the ticket was $102, which is $17 a day as opposed to $18 a day on the one-day ticket. We would have refunded to you $17 per day that you didn't use the ticket, if it was a medical refund. In addition, we would also refund the day that you were—let's say you were [1663] injured. We would also refund that day.

Q. Let's say I am a skier who has come to Aspen and I have pre-purchased a three-area, six-day ticket and I have arrived in town and skied one day and I decided I wanted to go to Aspen Highlands.

A. That's fine.

Q. And I have purchased my six-day, three-area ticket through a tour operator.

A. With the tour operators, there is only one instance where it makes any difference to us how you use the ticket, and that is if you have come and you get there and you hate skiing and you are not going to go skiing and you just really don't want to go skiing; so you bring us in a whole ticket that has never been used at all. Well, now, if it was a commissionable ticket, you paid $102 for it to the travel agent, but we didn't get $102. We got $102 minus 15 percent or 10 percent; so at that point, we do take it out. But if you have used that ticket even once, we don't take anything out. We just slide you right into our overall refund policy and we take out the cost of a one-day ticket.

• • •

[1664] Q. The example I would like to use for purposes of illustration, Ms. Taylor, is the one I mentioned a couple

of minutes ago. Let's say I pre-purchased the six-area—six-day, three-area ticket last year. I have come to Aspen. I bought the ticket through a tour operator. I have skied one day at Buttermilk and I have decided to go to ski at Aspen Highlands. I want to see how much of a refund I get from the money that was paid and at the same time, I am interested in seeing what that one day of skiing at Buttermilk netted to Aspen Skiing Corporation. Do you understand the question?

A. I think so. The ticket cost $102.

* * *

THE WITNESS: The ticket cost $102. That's what you paid for it. What we got for it, because it was a commissionable ticket, would be less 15 percent, so it would be $102 minus $15.30. So what we got from the ticket was $86.70. That was net to us.

Now, you skied on it one day?

Q. (By Mr. Maywhort) I skied on it one day at Buttermilk.

A. Okay. We are going to put you into the regular refund policy. The one-day ticket for last year was $18; so we are [1665] going to refund to you $84. So at this point, as far as you are concerned, it is the same as though you walked up to the ticket window and bought a one-day ticket. You are all through. We received $2.70 for the day that you skied at Buttermilk.

Q. Thank you.

A. Did I figure it wrong?

Q. So who ends up absorbing the 15 percent commission that was paid to the tour operator?

A. In this instance, the Aspen Skiing Corporation.

Q. Now, how does this policy differ, if it does at all, from the policy that was in effect during the years with the joint four-area ticket?

A. During those years, we generally—we also always took out some kind of a service charge; so the customer, no matter how many times he used the ticket or hadn't used the ticket at all, always had the service charge taken off the top before you went to the place where you took off the daily rate.

Q. Why do you do that?

A. We could not—we were dealing with two companies, and the administrative costs were quite high for us. Also we were unable to tell at that point when we had just the one four-area ticket whether it was commissionable or non-commissionable because we were still working with a voucher system in which in effect tickets that were commissionable were going out through the individual ticket window; so we had no real way to [1666] trace anything back.

Q. What sort of an effort is involved in a skier's obtaining a refund?

A. None. They just have to come to an adjustment office. If they don't have time to come to an adjustment office, they can mail us the ticket.

Q. So from your standpoint of having observed skiers and customers for several years, what in your observation are the impediments or barriers to a skier who wants to ski at Highlands after having purchased a multi-day ticket from the Aspen Skiing Corporation?

A. There are none. All he does, in effect, is lose his discount and gain the convenience of not having to go through the ticket lines.

* * *

Q. Now, we heard testimony in this case that during the 1977-'78 season, Aspen Highlands did, in fact, make refunds on the joint four-area ticket. Did you hear that testimony, Ms. Taylor?

[1667] A. Yes, I did.

Q. What was your reaction upon hearing that?

A. I was very surprised.

Q. Why?

A. I didn't think that Highlands had made any refunds.

Q. Do you know now whether the Highlands did in fact make any refunds?

A. Yes, I do. I went to the general ledger and they refunded that year approximately $800. We refunded that year on that four-area ticket approximately $110,000.

Q. Do you know how the numbers of checks written for refunds compared between the two companies?

A. Well, I know that we did over 1,200 individual checks, and perhaps I would have to go back into how many checks they wrote.

Q. Was it under 20?

A. I would assume it would have been under 20, yes.

• • •

MR. EVANS (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[1670] Q. And so that the aspect that you are describing with regard to the refund policy now, being that there is no service charge or that Aspen Skiing Corporation absorbs the commission—that's new since 1977-'78.

A. Can we back up? May I look at something for a moment?

Q. Certainly.

A. On this commissionable ticket in 1977-'78—three-area ticket?

Q. Yes.

A. Okay. Only the commissionable ticket during that time had a service charge on it.

Q. I thought that's what I asked you. That would be a tour operator?

A. That's a tour operator—the ones that went through the window did not.

• • •

[1671] Q. Is an explanation of the refund policy given to a skier each time he purchases a six-day ticket?

A. If there is any question in the skier's mind, it is.

Q. But it is not routinely—the technicalities and the nature of the refund policy aren't explained at the time of purchase on a standard basis.

A. No. I would say they probably are not. The tickets, however, are not marked "non-refundable."

• • •

[1673] Q. Oh, well, you said the sales were comparable—sales of the Aspen Skiing Corporation multi-day tickets were comparable.

A. Well, skier days, if I am reading that audit correctly—then skier days is what you are dealing with. Do you want me to read you the numbers?

Q. Fine.

A. Okay. '62-'63, we show that we took back 18,000 coupons and we sold in our six-day—seven-day ticket 21,000 skier days, because we have to compare skier days. You can't just compare a ticket, because one ticket was worth one day and the other ticket was worth seven days.

In '63-'64, it was 26,000 coupons or skier days that were joined and 48,000 of our own skier days.

'64-'65 would have been 28,000 of the joint and 71,000 of the Aspen Ski Corporation's.

'65-'66 is 28,000 as compared to 67,000 skier days for the Skiing Corporation.

'66-'67 is 21,000 coupons or joint tickets compared to 71,000 skier days for the Aspen Skiing Corporation.

'67-'68 is 54,000 as compared to—this is year that is just about even—55,000 for the Aspen Skiing Corporation.

[1674] In '68-'69 and '69-'70, we started a trend to where there were more of the joint tickets than ours—than our multi-day tickets.

* * *

[1675] Q. So from the records that you have been [1676] able to review, Mrs. Taylor, the trend shifted in or about 1967-'68—that period of time—from that period of time forward—to the four-area ticket, because at that period of time Snowmass was also now developed. The four-area ticket became the more popular item, according to these records.

A. Yes. I believe so.

* * *

Testimony of Charles R. Goeldner

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

* * *

[1761] Q. Do you have any opinions, Dr. Goeldner, with respect to the competitive sitaution [sic] between these 13 Colorado vacation areas listed on Exhibit AA?

[1762] A. Well, yes, I do. I would say that these are the types of areas that are competing with each other. I would

have to add additional areas in the Rockies as the prime competitors. Now, there is no question but what a number of our Colorado ski areas compete in the international market; but they all compete in the natioanl [sic] market. Our skiers in Colorado come from Illinois, Texas, California—basically from all over the country, and they have a choice of going to these vacation areas, of going to Heavenly Valley, Sun Valley, Jackson Hole, Tahoe. Some of these ski areas are of a higher quality, offer a better product, are more competitive than others; and I would say that these are basically the ski areas where there is the competition for the destination resort skier, and they have to work hard to get them and they have to work hard to improve their product, their marketing effort, and so on.

Some of them, due to their size, have an advantage that they are more attractive. For example, Snowmass, Vail, Heavenly Valley, are all of substantial size, where they have a reputation such as Sun Valley; and so they all have their various competitive advantages and disadvantages. But this is basically where the prime competition exists for the destination skier.

* * *

[1772] Q. Dr. Goeldner, do you have any understanding with respect to the degree of customers in Aspen who come on a package?

A. Yes, I do. If we look at those skiers who come to Aspen, it will vary in different years; but roughly about 20 percent of the skiers who arrived in Aspen in the latest Aspen in-room skier study stated that they had come to Aspen on a package. If you go back further, you can go back to '73-'74. I could cite you a figure of 35 percent that came on a package. Since then, the airlines have backed off on their packages a little bit, and I would say that if we are talking about current market conditions that probably we are talking about 20 percent of the skiers who would arrive there on a package.

Q. Do packages typically include a pre-sold lift ticket?

A. Yes, they do. Usually when you are talking about a package, a package will include transportation, lodging, and lift ticket. That is not true in all cases, but that is the typical situation. That is sort of considered to be the standard [1773] of the industry.

• • •

[1775] Q. Dr. Goeldner, are you familiar with the phrase or the term "borrowed support"?

A. Yes, I am. It is a term I se [sic] very frequently in my classes. It is a marketing term that we talk about in reference to location.

• • •

Q. And does it apply, or what application does it have [1776] in your opinion to this case?

A. It was one of the first things that I thought of when I thought of this situation and this case; and that is that if we look at the Aspen situation, we have four mountains there together. If we look at the Aspen Skiing Corporation mountains, they are in my opinion the most attractive mountains there. Physically they are the most attractive. They have the highest quality skiing, the best snow grooming. They are known worldwide for this. Snowmass we have already talked about as being one of the best ski areas in the country; and so basically they are what I would call the anchor of skiing in Aspen.

If you were going to build a shopping center, you would put in a department store or two department stores, and those would be the anchor stores. Then you would have a lot of smaller stores around them; and this is what we mean by borrowed support. That would be a very good location for a smaller store, because the department store, the anchor store, would attract customers, bring them to that

particular facility. Then enough of them would slop over into your shoe store. If you have any kind of management at all, you are likely to be successful. I have said in this case instead of suing the Aspen Skiing Corporation, Aspen Highlands should thank them because they bring an incredible number of skiers to Aspen because they are the anchor. They are the reason that the destination skiers decide to go to Aspen, and Highlands, while they have them there—[1777] they do have a shot at them. They are a possible choice.

• • •

Q. Do you have an opinion as to the desirability of the advertising in trying to create a particular product image?

A. Yes, I do.

Q. What is that opinion?

A. When you are trying to create a product image, you are trying to sell your product in the marketplace. You want to first of all do a lot of product planning. You want to position yourself in the market at what level you might want to compete; and once you determine where you are going to compete, you want to come up with the highest quality product possible and you want to attract customers to your product.

Now, you will find that in marketing the kind of marketing strategy you are going to use is going to depend upon the product and the marketplace. There are times when you might want to engage in some kind of cooperative marketing efforts. Now, we have seen that in the ski industry—we have seen Colorado [1778] Ski Country U.S.A., which basically doesn't market any particular area. They market Colorado skiing, come to Colorado, Colorado Ski Country U.S.A., best in the world. We also saw an organization which is almost defunct now called Ski the Rockies; and again that was a cooperative effort, with Ski the Rockies, come to the Rockies, with no specific area being singled out.

When you are new and starting, you typically want to put a lot of your effort into that kind of thing, because it may be a matter of their skiing in the Rockies or not skiing at all. Once you get them to come and they become familiar with your area and so on, then you begin to move into what I call using selective appeals or a combination of primary and selective appeals.

Now, you have got the customer out there, so now you are selling your area and you are trying to get them to select your area over all the other choices that they have. The ski industry has reached a stage of maturity where it still has sense to do a little bit of cooperative effort, because that's good for the industry and good for everybody; but people are still using selective appeals in trying to get people to select their areas.

As a marketing professor, I think I would probably lose my job for incompetence if I said that one competitor should advertise another competitor's product. The very essence of competition and what makes our country tick is that we want [1779] to get people to use our product. The only way we can get them to use our product is to make it better, of higher quality, to give more quality for the money than our compeition. When we do that and we attract a customer, then that makes our competition lose customers, or we have to have an expanded market if that doesn't take place. Well, if he loses customers, that is going to be a very traumatic experience for him; so what is he going to do? He is going to improve his product.

Then we go back and the other competitor improves his product, and that way we get the maximum of consumer satisfaction, and that is the essence of what our country has worked on and why I think we have the best products in the world and why competition has worked for us.

• • •

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[1796] Q. Let's talk for a moment about your views on the growth of ski areas. Is it true that the number of skiers that can come to Aspen is limited by the number of beds that are in Aspen?

A. There has to be some kind of a ratio between the beds and places for skiers to stay, and also the mountain capacity. I would say it is probably more limited by pillows. We tend to talk about pillows at ski areas, and it would be somewhat limited by that factor.

Q. Are you familiar with whether or not there are any restrictions in Pitkin County in terms of how many pillows people can build?

A. The Aspen situation is well-known. It is the same as Boulder's for growth management control, and there is a certain amount of development that can go on. One cannot come in and arbitrarily throw up all sorts of units. I am not aware of all of the regulations.

• • •

[1800] Q. Now, have you reviewed any of the promotional materials of Aspen Highlands or the Aspen Skiing Corporation?

A. Yes. I tried to review the promotional materials of all the ski areas every year.

Q. And isn't it true that with respect to the promotion—the promotional materials used by the Aspen Skiing Corporation on the national market that that promotional material emphasizes the Town of Aspen, the variety of skiing, and the snow conditions? [1801] Isn't that correct?

A. The promotional material that I have reviewed for Aspen Skiing Corporation that they use in the national

market, whether it be media advertising, whether it be brochures—they feature Aspen, which is the name of their mountain. Let's talk about the brochure. They feature Aspen, which is the name of their mountain. It is also the name of the town.

They will say in their brochures to ski Aspen's three mountains of Snowmass, Buttermilk, and Aspen Mountain. They will also then include in that brochures pictures of people having a good time and so on; and they will probably give, I would say, about equal space, equal copy, to the town and say that it is charming and that it has the victorian atmosphere and that it has X number of good restaurants and anything else that they feel that they can mention which would give that downhill skiing experience value and make it competitive with the same type of experience that you get at Vail, which also has restaurants, though it does not have the charming victorian town.

Q. Is it your interpretation of those national advertisements that when they say, "Ski Aspen's three mountains," what they really meant was to ski Aspen Skiing Corporation's three mountains?

A. That is what they are trying to get the consumer to do. This is what I referred to earlier when we talked about [1802] selective appeals. They are trying to use an appeal to get the consumer to select their product.

Q. Okay; so when they say, "Aspen," they meant Aspen Skiing Corporation. Is that correct?

A. I would interpret it that way, yes.

• • •

Q. So it's true if they haven't been there before they would look at these advertisements and think that there are three mountains rather than four mountains in Aspen. Isn't that correct?

A. No. I can't agree with that because in their advertising and in their brochures, they do have a picture of all [1803] four. So it would depend upon how observant they are whether they realized there were three or four mountains there.

MR. TRAUTMAN: Would the Clerk hand the witness Exhibit 103, please. I believe it is the magazine.

Q. Would you look at the page that has the clip on it, please.

A. The clip must have been—wait a minute. Okay. I found it.

Q. Now, is that a national advertisement that you are familiar with?

A. Yes, it is.

Q. And is it true that that advertisement shows the map of Aspen and labels three of the mountains on that map?

A. Yes, it is.

Q. And is it true that the Buttermilk label is right over Aspen Highlands?

A. Well, needing bifocals, I can't find any labels on the ads. Oh. I see what you are saying.

Q. I am not saying anything. I am asking you.

A. Yep. If we look at the picture and we look at it from left to right, the Buttermilk label with its vertical rise and so on is in the middle, and if I look directly up the top of the ski slopes at Aspen Highlands, I would run into the Buttermilk name. Yes.

• • •

[1805] Q. Let's look at '73-'74, '74-'75, and '75-'76 and '76-'77. Do you see those figures, Dr. Goeldner?

A. Yes. I have been reviewing those figures, and it is correct that over that period of time that Aspen Highlands had a greater number of skier visits than Buttermilk, as was also true in the early 70's, when there was not a four-area ticket.

Q. Is it your understanding there was no four-area ticket in the early 70's?

A. It is my understanding that in '70 and '71 and '71 and '72 that there was not a four-area ticket.

Q. Were you here for the testimony yesterday of Kay Taylor?

A. No, I was not.

Q. Let's look at what happened after the elimination of the four-area ticket to the relative market share between Aspen Highlands and Buttermilk. Did the consumer preference change at that point?

A. Now, what is it you want me to look at?

[1806] Q. What happened in the years '78-'79 and '79-'80 to the relative market share between Aspen Highlands and Buttermilk?

A. It appears that Buttermilk increased its skier visits and consequently it increased its market share, and that occurred in all three of those subsequent years.

Q. Okay. Now, is it your testimony that the consumer preference is really judged by skier visits or the lift tickets that they buy?

A. As I said earlier, the consumer is voting in the marketplace. Their preceptions of value and what they are getting for their money are voted in the marketplace. But as I said earlier, you can't ski on a lift ticket or eat it. It is a vehicle to get you up to the slopes.

Q. All right; and is it true that the voting changed about the time that the four-area ticket was eliminated at least with respect to Buttermilk and Aspen Highlands?

A. In respect to Buttermilk and Aspen Highlands, it appears that there has been that change.

Q. All right; and it is your opinion that that is a change in consumer preference over what had existed previously. Is that correct?

A. I would say yes.

Q. In other words, in the year '77-'78, people all of a sudden took a liking relatively speaking to Buttermilk over Aspen Highlands. Is that correct?

[1807] A. Well, again I think that we can't simply answer that yes or no. It is a more complicated situation than that.

• • •

[1809] Q. Let's identify the study, first of all, Dr. Goeldner. This is the 1979-'80 study which you did in conjunction with another person. It that correct?

A. Yes.

Q. Okay; and this is a study that was done in a year when there was no four-area ticket. Is that correct?

A. That is correct.

Q. Now, isn't it true that you asked the question, "What area would you like to ski but won't?" And you got multiple responses. For Aspen Mountain, there were 116 that said that they would like to ski it but they wouldn't. Snowmass, there were 50 that said they would like to ski it but wouldn't. Buttermilk, there were 64; and 176 said that they would like to ski Aspen Highlands but they wouldn't. Is that correct?

A. That is correct; and that was all the cases of people. There were multiple responses there. Now, if you were to go back and take the responses, then that 53 percent would have been roughly about 40 percent—still a very sizable number, but we do have multiple responses there. That was all cases, rather than the responses in the study; and so I would like to make that clear.

• • •

[1816] Q. And isn't it true that of the 39.9 percent that said that the lift ticket was not good on other mountains that what they were talking about was Aspen Highlands?

A. I would say yes, that that is most likely the correct interpretation of that data.

• • •

[1821] Q. Would you agree that the type of ski school that's available in a destination resort is important?

A. Yes, I would.

Q. Would you agree that GLM is a very popular and very innovative ski method?

A. That is an area where I would give Aspen Highlands an A. They have kept up with the marketplace, and in the area of the ski school they have given the customer what they wanted.

I would be somewhat critical of Aspen Skiing Corporation for not moving to GLM and offered that.

• • •

Q. Isn't it true that in your '77-'78 survey that you asked the question about where people went to ski school once they arrived in Aspen? Do you recall that?

A. Yes, very definitely.

Q. Do you recall the very high percentage—much higher percentage than the market share of skier visits—

said they went to Aspen Highlands rather than to any of the other Aspen mountains?

[1822] A. Yes, I do. That particularly caught my attention, and I think it stuck out as something like 26 percent, and their share was closer to 15 percent. That bothered me, because I said, "Well, you know, it ought to be consistent in a survey; and we have some problems with our methodology?" So in visiting with people, they told me that they would expect to have it be that way because Highlands has a good ski school, and they offered GLM, and they felt that was attracting customers to that ski school.

Q. These people that you visited with were people from the Aspen Skiing Corporation, weren't they?

A. That is correct.

Q. And why don't you tell the jury what they said about the Aspen Highlands Ski School? First of all, who were they? Mr. Brendlinger?

A. I am not positive, but I think it was probably Mr. Brendlinger and Mr. Biedleman. I said, "Now, if you were to look over this data, would it bother you at all?"

They said no, they would expect that, and they mentioned the GLM. They said it was attractive and that for their own reasons that their ski school director had chosen to follow the older method of ski school instruction.

Q. Now, this statistic that we were just talking about was during the '77-'78 season, when there was still a four-area ticket available. Isn't that correct?

[1823] A. I believe that's correct.

• • •

Testimony of Stacy Standley

MR. PALMER (COUNSEL FOR ASPEN SKIING CORPORATION, BUTTERMILK MOUNTAIN SKIING CORPORATION, AND SNOWMASS SKIING CORPORATION)

• • •

[2045] Q. Let's turn our attention to the Little Annie project which is underway in Aspen. What has been your involvement with that project?

A. In the spring of 1975, Snow Engineering was asked to submit a proposal to undertake the master planning of Little Annie for Dave Farney, the proponent for the project. I drafted the proposal which was accepted; and during the summer of 1975 and up to October of 1975, when we submitted the master plan for the Little Annie project, I was the Project Director and Chief Planner on the project.

Q. Did you continue to have a consulting relationship on the Little Annie project up through the time you left Snow Engineering?

A. Yes, I did; and Snow Engineering still has an ongoing consulting relationship with Little Annie.

Q. And from time to time, they call on you in that regard?

A. Yes.

Q. Where does Little Annie stand now in the approval process?

A. Well, one of the offshoots of the Colorado Winter Resource Advisory Committee that I served on and explained earlier was the development of the Colorado Joint Review Process, which was an administrative approval process that was set up by [2046] the state that would bring together all of the government or quasi-governmental agencies that would have to make decisions regarding a ski area, and that would include the Forest Service, the city, the county, and the state, perhaps the municipal sanitation district—whatever other type of agencies would have to deal with a new ski area being developed within their

environment. That process requires going through a series of hoops that takes approximately five years.

Little Annie is now reaching the end of that five-year hoop-jumping process, if you will. It's received the approval of the City of Aspen at this point. The draft environmental impact statement has been circulated by the Forest Service, and the final environmental impact statement will be out this month, June, 1981. The county has their final meeting, or perhaps their final meeting, on the resolutions on June 22, which is next Monday, I believe; and the state has yet to pass judgment or blessing, as the case may be, on the Little Annie project.

• • •

Q. Do you have any basis on which to believe that the state approval will be forthcoming or not?

[2047] A. I have been involved in the discussions and work sessions for several years that include the State Planning Office Paula Hertzmark's office; and though I haven't sat in on any in the last few months, I know what the tone has been and what the general concerns have been and the position the state appears to be taking.

Q. What is that?

A. It appears that if the local government agencies support Little Annie, then the state also supports the project.

Q. Are the local agencies supporting Little Annie at this point?

A. The city, as I have said, already has passed support on it, and the county has not completed its investigation. It has not made a final determination but is preparing resolutions that would allow them to take that action should they choose to take that action, next Monday.

Q. To approve the project?

A. Yes.

Q. What capital investment is Little Annie contemplating in opening their new area?

A. It will require between 32-and $34-million to develop the area to a level of 4,500 skiers per day capacity.

Q. When is Little Annie projected to open?

A. Right now, the planning process schedule is in the 1983-'84 season.

* * *

[2050] Q. Did you work on the economic analysis and projections for Little Annie?

A. Yes, I did.

Q. In doing that economic analysis, did you assume that there would be or that there would not be a multi-area ticket in Aspen?

A. No. We did not assume a multi-area ticket. In fact, one of our strategies was to look at differential pricing as a means of inducing or enticing skiers to use our mountain, to experience it.

Q. What do you mean by assuming differential pricing?

A. A different price than the other areas would be charging. In our case, we were looking at a lower price.

Q. Is there any reason to believe that Little Annie will not proceed on schedule?

A. None that I am aware of.

* * *

[2074] Q. What was the subject of your discussions?

A. It was that Snow Engineering had been approached by a client that was interested in perhaps making an offer to purchase the Aspen Highlands ski area from Mr. Jones.

Q. Was that client at that time 20th Century Fox?

A. Yes, it was.

* * *

[2075] Q. Did you also have discussion with Mr. Jones concerning his activities at the national level as opposed to the local level?

A. Well, we did, only in that I was trying to develop information for putting together an analysis for the client.

Q. Okay. What was said by you about those subjects and what was said by him?

A. Well, what I was trying to do was a financial analysis and I asked Mr. Jones if I could have his copy or Xerox copies of the National Ski Areas Association financial questionnaire, the economic questionnaire that was filled out yearly by the area operators. Mr. Jones told me that it didn't belong to the National Ski Area Association.

I said, "Well, why not?" or something to that effect.

He said, "Because Aspen Skiing Corporation belongs, and I don't need to. They take care of the big things, and I take care of my operation."

* * *

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

* * *

[2079] Q. Do you understand that that's what the Aspen Highlands five-year plan is intended to do?

A. Yes. I do see that.

Q. With respect to your involvement in Little Annie, is it true that Little Annie started prior to '75-'76 season?

A. Little Annie had been a proposed ski area since, I believe, the 1940's, as a matter of fact.

• • •

[2080] Q. So there is no Forest Service permit at this point in time?

A. There isn't. There will be a recommendation as part of the EIS.

Q. And at this point in time, the county has not approved Little Annie; is that correct?

[2081] A. The county has drafted resolutions, but it has not acted on those resolutions.

Q. Now, if, in fact, Little Annie receives the approvals that you think it will of the county, the state, and the Forest Service, it is possible, is it not, for Mr. Farney and his limited partners to transfer that permit to some other party?

A. With approval of the Forest Service, that can be done. It is conditional. It also would require the approvals of the state and the county.

Q. But in fact that can take place so that Aspen Skiing Corporation could acquire the right to develop Little Annie, just like they acquired the right to develop Snowmass. Isn't that correct?

A. I suppose that if they were able to successfully negotiate something along those lines, that is possible.

Q. Okay. The capital costs of Little Annie, 34- [sic] to $34-million—that works out to almost $10,000 a skier visit, doesn't it?

A. I think it would be 8,000.

Q. 8,000?

A. It would be a ballpark figure.

Q. Do you know how that compares to what the average development costs are at this point in time for a major ski area?

A. It is well in excess of the average cost of major ski [2082] areas.

Q. It is a heavy financial investment, is it not, for Mr. Farney and his group of investors?

A. I would say that yes, it is.

Q. Is it true that they have not received any financial commitments beyond the initial capital contributions that we discussed for development?

A. I am really not at liberty to say.

Q. Do you know?

A. I do know.

Q. Why aren't you at liberty to say?

A. Because of the client/consulting relationship.

• • •

Q. Okay. You can't tell me whether or not they have got financial commitments at this point in time and from whom?

A. I can't tell you that.

• • •

Testimony of Whipple V.N. Jones (Recalled)

MR. TRAUTMAN (COUNSEL FOR ASPEN HIGHLANDS SKIING CORPORATION)

• • •

[2187] Q. Now, with respect to the last item—this additional $2-million because you are located in Aspen, do you consider that to be something that was a windfall to you?

A. To a certain extent; but also we were the second ski area there, and I think we contributed a lot to the community in [2188] its development. When we started out,

there were 10 lodges. Now there are over 100. The same thing is true about restaurants and other facilities there. I really think that Aspen Highlands put in a lot of innovative ideas: Picnics, NASTAR, GLM, and we put Cadillac machinery on the mountains. I think our organization had a lot to do with helping Aspen to grow.

• • •

[2191] DEFENDANTS' RENEWED MOTIONS FOR A DIRECTED VERDICT

MR. PALMER: Your Honor, at this time the defendants renew and reassert their motions for directed verdict; and I would incorporate the arguments made at the close of the plaintiff's case. We think that in all of the issues, including both the Section 2 and the Section 1 issues that plaintiff has proved our case under the decisions cited in our trial brief.

In order to save time, however, I think as to the Section 2 claims I will simply incorporate our prior argument. We think that all of the evidence is that first of all the [2192] relevant market is not so narrowly confined as to include Aspen, because 80 percent of these skiers are repeat skiers. They know the area. They routinely go other [sic] areas. There is not distinct [sic] group of customers that's been shown; and all of the evidence has shown that all of these mountains compete at the destination resort level. We don't think that the fact that Aspen Highlands has chose [sic] to concentrate its advertising at a local level, if, in fact, it has, has anything to do with the economic analysis and the competitive realities at issue in this case.

We also believe, Judge, that Dr. Goeldner presented the only competent economic testimony in this case, and that testimony was that there is not [sic] showing of monopoly power. There is certainly under the facts as in evidence no showing of a power to control price or to exclude competition.

• • •

[Jury Instructions]

THE COURT:

• • •

[2310] On the other hand, if you do find monopoly power, you must consider the second essential element: Whether Aspen Skiing Corporation willfully acquired, maintained, or used that power by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes.

"Willfully" as used in these instructions means acting knowingly and deliberately, but it does not mean that Aspen Skiing Corporation must have specifically intended to achieve or maintain monopoly power.

In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its superior business ability and efficiency does not constitute monopolization.

[2311] For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal

with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.

In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.

To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or sub-market.

* * *

PLAINTIFF'S TRIAL EXHIBITS

Plaintiff's Exhibit #97

TABLE

ASPEN HIGHLANDS CASE

ACTUAL SKIER-VISIT SUPPLY, DEMAND AND UTILIZATION

	1973-74		1974-75		1975-76		1976-77		1977-78		1978-79		1979-80		1980-81	
	S-V (000)	SHARE %	S-V (000)	SHARE %	S-V (000)	SHARE %	S-V (000)	SHARE %	S-V (000)	SHARE %	S-V (000)	SHARE %	S-V (000)	SHARE %	S-V (000)	SHARE %
SUPPLY (CSV)																
Aspen Corp. (3 Areas)	1,898.8	74.9%	1,940.6	77.3%	2,127.0	75.9%	1,509.8	69.1%	2,174.1	76.3%	2,001.0	73.9%	2,076.0	75.5%	2,048.0	75.2%
Aspen Highlands	637.2	25.1%	570.8	22.7%	673.6	24.1%	673.6	30.9%	673.6	23.7%	708.0	26.1%	673.6	24.5%	673.6	24.5%
Total Aspen	2,536.0	100.0%	2,511.4	100.0%	2,800.6	100.0%	2,183.4	100.0%	2,847.7	100.0%	2,709.0	100.0%	2,749.6	100.0%	2,721.6	100.0%
DEMAND (SKIER-VISITS)																
Aspen Corp. (3 Areas)	849.2	84.2%	930.0	82.9%	1,023.6	82.6%	421.4	79.5%	1,073.9	84.3%	1,140.3	86.9%	1,148.6	87.5%	875.8	89.0%
Aspen Highlands	158.9	15.8%	191.9	17.1%	214.9	17.4%	108.4	20.5%	199.5	15.7%	172.3	13.1%	163.7	12.5%	108.7	11.0%
Total Aspen	1,008.1	100.0%	1,121.9	100.0%	1,238.5	100.0%	529.8	100.0%	1,273.4	100.0%	1,312.6	100.0%	1,312.3	100.0%	984.5	100.0%
UTILIZATION																
Aspen Corp. (3 Areas)	44.7%		47.9%		48.1%		27.9%		49.4%		57.0%		55.3%		42.9%	
Aspen Highlands	24.9%		33.6%		31.9%		16.1%		29.6%		24.3%		24.3%		16.1%	
Total Aspen	39.8%		44.7%		44.2%		24.3%		44.7%		48.5%		47.7%		36.2%	
SUPPLY/DEMAND INDEX																
Aspen Corp. (3 Areas)		1.124		1.072		1.088		1.151		1.105		1.176		1.159		1.184
Aspen Highlands		.623		.733		.722		.663		.662		.502		.510		.444

PLAINTIFF'S EXHIBIT 97 79-Z-1012

BEST AVAILABLE COPY

Plaintiff's Exhibit #103

Aspen

More Mountains, More Fun

Aspen's three mountains...Aspen, ttermilk and Snowmass...promise a ry different kind of skiing experience. It rts with 2,335 acres of ski slopes and endless variety of skiing terrain.

Add in lots of snow...300 inches on e average fall every year...and one lift ket for all three mountains, and you ow why three out of four of our skiers ve been here before.

Off the slopes, you'll discover the town. One hundred years old, Aspen is Victorian buildings and charming shopping malls, over 100 restaurants and nightspots, friendly people and a sense of history. It's another reason one Aspen visit is never enough.

Write for our exciting winter brochure.

Aspen Skiing Corporation

Box 1248, Aspen, Colorado 81611 • 303/925-1220

Aspen Mountain, Buttermilk, Snowmass

One day, adult $18

Six days, adult
(good for 6 out of 7 consecutive days)

Low season — November 27-December 20, 1980; January 1-January 31, 1981; March 26-April 2, 1981 .... $90

Regular season — December 20-January 3, 1980; January 31-March 28, 1981 $102

Aspen Mountain only
Young at Heart (65 and older) $12

Buttermilk and Snowmass only

Half-day, adult
Starts at Buttermilk at 12:00 p.m.... $10
Starts at Snowmass at 1:00 p.m. ... $10

Child (12 and younger)
One day $6

Young at Heart (65 and older)
One day $6

Aspen Central Reservations
303 925-9000

Cards Welcome

Aspen Mountain.

- Vertical Rise: 3300 feet
- Lifts: 7 double chairs
- Most Difficult: 75%
- More Difficult: 25%
- Longest Run: 3 miles

Opening & Closing Dates: December 6, 1980-April 12, 1981.

Buttermilk.

- Vertical Rise: 2000 feet
- Lifts: 5 double, one T bar, one pony lift
- Most Difficult: 19%
- More Difficult: 33%
- Easier: 49%
- Longest Run: 2 miles

Opening & Closing Dates: ...ember 27, 1980- March 29, 1981.

Snowmass.

- Vertical Rise: 3600 feet
- Lifts: One triple chair, 11 double chairs
- Most Difficult: 25%
- More Difficult: 60%
- Easier: 15%
- Longest Run: 3.5 miles

Opening & Closing Dates: November 27, 1980- April 12, 1981

223

BEST AVAILABLE COPY

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-7-1012

ASPEN HIGHLANDS SKIING CORPORATION,
a Colorado corporation,

Plaintiff,

v.

ASPEN SKIING CORPORATION,
a Delaware corporation, *et al.*

Defendants.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

---

* * *

Defendants' Requested Jury Instruction No. 19

(Monopolization)

The mere existence of monopoly power does not violate the law unless there is also proved to be a purpose and intent by defendants to exercise such monopoly power through anticompetitive actions.

United States v. Griffith, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 2d 236 (1948); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

* * *

Defendants' Requested Jury Instruction No. 20

(Monopolization)

An intent to misuse monopoly power is not inferred from the fact that a monopolist competes aggressively with its business rivals, even though that competition may result in

economic damage to the competitor or enhancement of a monopolist's own market position, if the conduct constitutes normal competitive behavior which is intended to meet competition and does not unreasonably restrict competition. In addition, a monopolist is not under a duty to cooperate with its business rivals. A monopolist engages in a normal competitive practice when it acquires or maintains its market position as the result of improved marketing, superior technology, superior management, superior service or product improvement.

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir.); *California Computer Products v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *International Railways of Central America v. United Brands*, 532 F.2d 231 (2d Cir. 1976); *Sargent-Welch Scientific Co. v. Ventron Corp.* 567 F.2d 701 (7th Cir. 1977); *See, Natrona Service, Inc. v. Continental Oil Co.*, 435 F.Supp. 99 (D. Wyo. 1977).

* * *

Defendants' Requested Jury Instruction No. 21

A monopolist who refuses to enter into a joint operating agreement with a competitor or who otherwise refuses to deal with a competitor in some manner, does not violate Section 2 if valid business reasons exist for that refusal. In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to be a monopolist in a relevant market, has not violated the law.

Mid-Texas Communications v. American Tel & Tel Co., 615 F.2d 1372, 1387 (5th Cir. 1980); *Byars v. Bluff City New Co., Inc.*, 609 F.2d 843 (6th Cir. 1979); *International Railways of Central America v. United Brands*, 532 F.2d 231 (2d Cir. 1976).

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-Z-1012

ASPEN HIGHLANDS SKIING CORPORATION,
a Colorado corporation,

Plaintiff,

v.

ASPEN SKIING CORPORATION, a Delaware corporation,
BUTTERMILK MOUNTAIN SKIING CORPORATION,
a Colorado corporation, and
SNOWMASS SKIING CORPORATION, a Colorado corporation,

Defendants.

SPECIAL INTERROGATORIES TO THE JURY

We, the Jury, hereby answer these Special Interrogatories as follows:

I. MONOPOLIZATION:

A. Relevant Market

1. Product Market: What do you find to be the relevant product market in this case? (Check one)

   _X_ (a) Downhill skiing at destination ski resorts

   ____ (b) Downhill skiing services in Aspen including multi-area, multi-day lift tickets.

   ____ (c) Other _____
   (Describe)

2. Do you find that there is a relevant product submarket?

_X_ Yes

___ No

3. If your answer to Question 2 is yes, identify the relevant product sub-market.

Downhill Skiing Services in Aspen including Multi-AR, Multi-Day Lift Tickets.

4. Geographic Market: What do you find to be the relevant geographic market?

_X_ North America

___ Aspen Area

___ Other _____
(Describe)

5. Do you find there is a relevant geographic sub-market?

_X_ Yes

___ No

6. If the answer to Question 5 is yes, identify the relevant geographic sub-market.

Aspen Area

B. Monopoly Power: Do you find by a preponderance of the evidence that during the years 1977 through 1981 the defendants possessed monopoly power, that is, the power to control prices in the relevant market or sub-market or to exclude competition from the relevant market or sub-market?

_X_ Yes

___ No

If your answer to the preceding question is "yes," proceed to Question I.C. If your answer to the preceding question is "no," proceed to Question II.

C. Willful Acquisition, Maintenance or Use of Monopoly Power: Do you find by a preponderance of the evidence that the defendants willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident?

_X_ Yes

___ No

If your answer to the preceding question is "yes," proceed to Question I.D. If your answer to the preceding question is "no," proceed to Question II.

D. Damages:

Do you find by a preponderance of the evidence that the plaintiff suffered injury in its business as a direct result of the defendants' willful acquisition, maintenance or use of monopoly power?

_X_ Yes

___ No

II. CONTRACT, COMBINATION OR CONSPIRACY IN RESTRAINT OF TRADE:

A. Contract, Combination or Conspiracy:

1. Do you find by a preponderance of the evidence that the defendants contracted, combined or conspired with some other person or entity not a party to this case to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means?

___ Yes

_X_ No

If your answer to the preceding question is "yes," proceed to Question II.A.2. and then to Question

II.B. If your answer to the preceding question is "no," proceed to the signature block below and sign and date these Special Interrogatories.

2. Indicate below the name of the person or entity with whom you find that the defendants agreed to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means.

_____

_____

B. Anticompetitive Effects: Do you find by a preponderance of the evidence that any contract, combination, or conspiracy constituted an unreasonable restraint of trade?

____ Yes

____ No

If your answer to the preceding question is "yes," proceed to Question II.C. If your answer to the preceding question is "no," proceed to the signature block and sign and date these Special Interrogatories.

C. Damages:

Do you find by a preponderance of the evidence that the plaintiff suffered injury in its business as a direct result of any contract, combination or conspiracy?

____ Yes

____ No

III. AMOUNT OF DAMAGES:

If your answer to Question I.D.., or II.C., or both, is "yes," indicate below the dollar amount of such actual damages, if any, to which you find by a preponderance of the evidence that the plaintiff is entitled.

$2,500,000.00.

Respectfully submitted,

/s/ C. ALAN ROTH
Foreperson of the Jury

DATED: June 18, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-Z-1012

ASPEN HIGHLANDS SKIING CORPORATION,
a Colorado corporation,

Plaintiff,

v.

ASPEN SKIING CORPORATION, a Delaware corporation,
BUTTERMILK MOUNTAIN SKIING CORPORATION,
a Colorado corporation, and
SNOWMASS SKIING CORPORATION, a Colorado corporation,

Defendants.

JUDGMENT

THIS ACTION came on for trial on the 1st day of June, 1981, before the Court and a jury of six duly sworn to try the issues herein, the Honorable Zita L. Weinshienk, Judge, presiding.

The trial proceeded to conclusion and the jury duly rendered its special verdict in the form of interrogatories. The summary of the verdict was that the jury found the issues herein joined in favor of the plaintiff and assessed its damages in the sum of $2,500,000.

The jury found by a preponderance of the evidence that the relevant product market was downhill skiing at destina-

tion ski resorts, that the relevant sub-market was downhill skiing services in Aspen including multi-area, multi-day lift tickets, that the relevant geographic market was North America, and that the relevant geographic sub-market was the Aspen area. The jury further found by a preponderance of the evidence that during the years 1977 through 1981 the defendants possessed monopoly power, and that the defendants willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident. The jury further found that the plaintiff suffered injury in its business as a direct result of the defendants' willful acquisition, maintenance or use of monopoly power.

The Court finds that federal law, 15 U.S.C. §15, requires that the plaintiff recover threefold the damages. It is therefore

ORDERED that Judgment enter for the plaintiff, Aspen Highlands Skiing Corporation and against the defendants Aspen Skiing Corporation, Buttermilk Mountain Skiing Corporation and Snowmass Skiing Corporation in the sum of $7,500,000.00, plus attorneys' fee and costs.

IT IS FURTHER ORDERED that there be a twenty (20) day stay of execution, during which time motions, briefs and affidavits may be filed.

The Court will rule on injunctive relief and attorneys' fees within thirty (30) days.

For The Court:
JAMES R. MANSPEAKER, Clerk

/s/ By: STEPHEN P. EHRLICH
Chief Deputy Clerk

Approved:

/s/ ZITA L. WEINSHIENK, Judge
ZITA L. WEINSHIENK, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-Z-1012

ASPEN HIGHLANDS SKIING CORPORATION,
a Delaware corporation,
Plaintiff,

v.

ASPEN SKIING CORPORATION, a Delaware corporation,
BUTTERMILK MOUNTAIN SKIING CORPORATION,
a Colorado corporation, and
SNOWMASS SKIING CORPORATION, a Colorado corporation,
Defendants.

INJUNCTION

Following the trial of this matter, and the entry of judgment herein on June 19, 1981 pursuant to special interrogatories returned by the jury, it is:

ORDERED, ADJUDGED and DECREED as follows:

I.

This Court has jurisdiction over the subject matter of this action and over the parties hereto.

II.

As used in this Injunction:

A. "Defendants" refers collectively to all of the defendants herein; "Aspen Skiing Corporation" refers to and includes the Aspen Skiing Corporation and its subsidiaries Snowmass Skiing Corporation and Buttermilk Mountain Skiing Corporation.

B. "Joint four-area, six-day ticket" means a ski lift ticket offered jointly by Aspen Highlands Skiing Corporation and

Aspen Skiing Corporation which accords the holder of the ticket access to the ski lifts operated in Pitkin County, Colorado both by Aspen Highlands Skiing Corporation and by Aspen Skiing Corporation.

III.

The provisions of this Injunction shall apply to all of the parties hereto, and to their officers, directors, employees, agents, successors and assigns.

IV.

Aspen Highlands Skiing Corporation, and the Aspen Skiing Corporation, shall continue to independently determine the price, variety and character of all ski lift tickets to be offered by them individually.

V.

Beginning with the 1981-82 ski season, and continuing each ski season thereafter during the term of this Injunction (as set forth by Paragraph VII hereof), the Aspen Skiing Corporation and Aspen Highlands Skiing Corporation shall offer a joint four-area, six-day ski lift ticket under the following terms:

A. Said four-area, six-day ticket shall consist of a coupon booklet substantially identical in format and paper stock to the Ski-the-Summit coupon booklet attached hereto as Exhibit A.

B. Said coupon booklet shall be sold subject to and imprinted with conditions and instructions printed in the inside cover of the coupon booklet, as follows:

1. Coupons are void if detached from book.
2. All coupons are non-transferable.
3. Only one coupon can be used each day from a book.
4. All coupons are void if front or back covers are detached.

5. Retain this coupon book intact until last day's skiing is complete.
6. Not for resale.
7. One coupon per day per area.
8. Coupons good only through last day punched.
9. Book good 6 out of 7 days.
10. Not responsible if lost or stolen.
11. Aspen Skiing Corporation and Aspen Highlands Skiing Corporation are not affiliated with one another.

C. The back cover of the coupon booklet shall be the same as Exhibit A, except it shall also state "Not responsible if lost or stolen."

D. All of the individual coupons in booklets sold by the Aspen Skiing Corporation shall be a uniform color (*e.g.*, blue), and all of the individual coupons in booklets sold by Aspen Highlands Skiing Corporation shall be a different color (*e.g.*, green).

E. All of the individual coupons in booklets sold through any travel agent or tour operator subject to a commission shall be identified by having a white diagonal stripe across each individual coupon. Thus, for example, the booklets sold by Aspen Skiing Corporation directly to consumers would contain blue coupons, and booklets sold by Aspen Skiing Corporation through travel agents or tour operators would contain blue coupons with a diagonal white stripe.

F. The parties shall individually bear all costs associated with the printing and distribution of the respective coupon booklets to be sold by them.

G. The price of the joint four-area, six-day ski lift ticket shall be $120 during the 1981-82 ski season. The price in any later ski seasons covered by this Injunction shall be

determined by the parties, or, if they are unable to mutually agree, by further application to this Court.

H. The parties shall pay commissions of at least 10% of the selling price to travel agents or tour operators through whom said tickets are sold to consumers. However, in the allocation of revenues between the parties as a result of the redemption of a commissionable ticket, said allocation shall be based upon the daily price of said ticket (*i.e.*, $120 ÷ 6 = $20) less a flat 10%. Any commission paid in excess of 10% shall, therefore, be borne by the party paying such commission.

I. Said ticket shall be refundable for the same reasons and on the same terms as ski lift tickets offered by the parties individually, except that:

1. The parties may make refunds on said ticket by mail;
2. The parties may deduct 10% of the selling price of said ticket with respect to refunds on coupon booklets sold to travel agents or tour operators for resale to consumers;
3. Neither party may process refunds on coupon booklets sold by the other party. However, the parties shall offer reasonable assistance to consumers by providing appropriate mail-in refund applications on forms prepared and distributed by the party which sold the coupon booklet; and
4. Refunds will be made on the basis of the highest daily lift ticket price being deducted for each coupon used.

J. The parties shall list this ticket in their area brochures and ticket price schedules, as follows:

"4-area, 6 out of 7 day Coupon Book $120"

The parties are not otherwise obligated to advertise or promote the sale of said ticket.

VI.

This Injunction is not intended and shall not be construed to restrain or limit competition between the Aspen Skiing Corporation and Aspen Highlands Skiing Corporation in the sale and marketing by them of their respective ski areas and such ski lift tickets as they may independently determine to offer.

VII.

This Injunction shall be in effect either for a period of three (3) years from the date of its entry, or until such time as the Little Annie ski area opens for business in Pitkin County, Colorado, under ownership which is independent of the Aspen Skiing Corporation, whichever period is shorter, at which time the Court shall review the circumstances existing at that time to determine whether the terms and conditions of this Injunction should be modified, eliminated or remain the same. Jurisdiction is retained by the Court during the time that this Injunction remains in effect, to enable the parties to apply for such further orders or directions as may be necessary or appropriate to effectuate or modify the provisions hereof, or to enforce compliance herewith.

DATED at Denver, Colorado, this 4th day of August, 1981.

By The Court:

/s/ ZITA L. WEINSHIENK
ZITA L. WEINSHIENK, Judge
United States District Court

Office-Supreme Court, U.S.
FILED
JAN 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,
Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Tenth Circuit

BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
MARK S. LEVINSTEIN
MANLEY W. ROBERTS
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Attorneys for Petitioner

Of Counsel:
DAVID G. PALMER
WILLIAM W. MAYWHORT
HOLLAND & HART
Denver, Colorado

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether under § 2 of the Sherman Act a firm with market power can be found to have a duty to cooperate with its smaller rivals in a court-ordered scheme of mandatory joint marketing?

2. Whether a firm can be found to have violated § 2 of the Sherman Act under the "essential facilities" or "bottleneck" doctrine not by denying a competitor access to an input necessary to its production process, but rather by refusing to combine with the competitor in the joint marketing of both firms' output to the public?

3. Whether a firm's refusal to participate in a joint marketing scheme demonstrates an unlawful intent to create or maintain a monopoly, in violation of § 2 of the Sherman Act?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
INTRODUCTION: THE DEVELOPMENT OF THE LAW OF MONOPOLIZATION	7
I. EVEN A FIRM WITH MONOPOLY POWER HAS NO DUTY, UNDER PAIN OF TREBLE DAMAGE LIABILITY, TO ENGAGE IN JOINT MARKETING WITH A COMPETITOR	15
A. In a Private Treble Damage Action, Substantial Exclusionary Conduct Should be Required for Monopolization	16
B. Refusal to Engage in a Joint Marketing Arrangement with a Horizontal Competitor is, Under Any Reasonable Definition, Not "Exclusionary"	18
1. Ski Co.'s Refusal to Continue the Joint Ticket Was Not Exclusionary	20
2. Ski Co.'s Refusal to Sell Lift Tickets to Highlands and its Refusal to Accept Highlands' Adventure Pack Coupons Were Not Exclusionary	28
3. Ski Co.'s Offering of its Own Six-Day Ticket Was Not Exclusionary	32
II. THE ESSENTIAL FACILITIES DOCTRINE DOES NOT APPLY TO THIS CASE	33
III. THE DECISION BELOW CANNOT BE UPHELD ON THE THEORY THAT SKI CO.'S CONDUCT MANIFESTED AN ANTI-COMPETITIVE INTENT	40

A. "Anti-Competitive Intent" Does Not Transform Independent Non-Exclusionary Conduct Into Monopolization	40
B. There is No Substantial Evidence That Ski Co. Had An Anti-Competitive Intent	44
IV. AN INDEPENDENT REFUSAL BY AN UNINTEGRATED FIRM TO PARTICIPATE IN A COOPERATIVE MARKETING ARRANGEMENT WITH A HORIZONTAL COMPETITOR SHOULD BE PER SE LAWFUL	48
CONCLUSION	50

TABLE OF AUTHORITIES

CASES: Page

Albrecht v. Herald Co., 390 U.S. 145 (1968) 42

American Football League v. National Football League 323 F.2d 124 (4th Cir. 1963) 36, 43, 44

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982) 17

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 11, 12, 13

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 9

Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) 23, 46

Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) 15

Associated Press v. United States, 326 U.S. 1 (1945) 33, 37, 41, 42

Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), *aff'd p.c.*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969) 14

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 14, 15, 48

Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) 18

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 22

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 40

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 17, 18, 40

Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979) 41, 43

California Computer Products, Inc. v. IBM, 613 F.2d 727 (9th Cir. 1979) 14, 19

Chicago Board of Trade v. United States, 246 U.S. 231 (1918) 41

Table of Authorities Continued

Page

Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982) 15

Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) 22, 49

Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731 (1984) 8, 40

Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir 1971) 43

Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091 (D. Md. 1979) 35

Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653 (lst Cir.), *cert. denied*, 368 U.S. 931 (1961) 14

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 34, 41, 42, 43

FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922) ... 42

FTC v. Curtis Publishing Co., 260 U.S. 568 (1923) 9, 48

FTC v. Sinclair Mfg. Co., 261 U.S. 463 (1923) 48

Fishman v. Wirtz, 1981-82 Trade Cas. (CCH) ¶ 64,378 (N.D. Ill. 1981) 36

Florida Cities v. Florida Power & Light Co., 525 F. Supp. 1000 (S.D. Fla. 1981) 36, 37

Gamco, Inc. v. Providence Fruit & Produce Building, Inc., 194 F.2d 484 (lst Cir.), *cert. denied*, 344 U.S. 817 (1952) 33, 34, 35

Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1980) 14

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) 35

Home Placement Service v. Providence Journal Co., 682 F.2d 274 (1st Cir. 1982) 43

ILC Peripherals Leasing Co. v. IMB, 458 F.Supp. 423 (N.D. Cal. 1978), *aff'd p.c. sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir.), *cert. denied*, 452 U.S. 972 (1981) 14

Table of Authorities Continued

Page

International Harvester Co. v. Missouri, 234 U.S. 199 (1914) 9

Jefferson Parish Hospital Dist. v. Hyde, 104 S. Ct. 1551 (1984) 35

Klor's Inc. v. Broadway-Hale Stores, Inc.,. 359 U.S. 207 (1959) 49

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 29, 35, 41, 43, 49

MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) 14, 35, 36, 37, 43

Mid-Texas Communications Systems, Inc. v. AT&T, 615 F.2d 1372 (5th Cir. 1980) 35

Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984) 48, 49

Montague & Co. v. Lowry, 193 U.S. 38 (1904) 33

NCAA v. Board of Regents, 104 S. Ct. 2948 (1984) 14, 19, 23, 49

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 14

Northeastern Telelephone Co. v. AT&T, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) .. 14, 46

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 34

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 48

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 23

Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) 50

Scott Publishing Co. v. Columbia Basin Publishers, Inc., 293 F.2d 15 (9th Cir.), *cert. denied*, 368 U.S. 940 (1961) 43

Simpson v. Union Oil Co., 377 U.S. 13 (1964) 42

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 7, 9, 46

Table of Authorities Continued

Page

Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912) 33

Swift & Co. v. United States, 196 U.S. 375 (1905) 10

Telex Corp. v. IBM, 510 F.2d 89[illegible] (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) 14, 19

Transamerica Computer Co. v. IBM, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983) 14

Travelers Ins. Co. v. Blue Cross of W. Pennsylvania, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 1973) 14

United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) 49

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 8, 9, 10, 11, 12, 13

United States v. American Tobacco Co., 221 U.S. 106 (1911) 7, 8, 9

United States v. Bausch & Lomb Optical Co., 321 U.S.707 (1944) 42

United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86 (1975) 15

United States v. Colgate & Co., 250 U.S. 300 (1919) 34, 41, 42, 48, 49

United States v. Columbia Steel Co., 334 U.S. 495 (1948) 13

United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956) 11

United States v. Griffith, 334 U.S. 100 (1948) 10, 11, 12, 13, 19, 34, 35, 40

United States v. Grinnell Corp., 384 U.S. 563 (1966) 8, 12, 13

United States v. International Harvester Co., 274 U.S.693 (1927) 10

United States v. New York Great A. & P. Tea Co., 175 F.2d 79 (7th Cir. 1949) 13

Table of Authorities Continued

Page

United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 11

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 42, 48

United States v. Patten, 226 U.S. 525 (1913) 9, 11

United States v. Reading Co., 253 U.S. 26 (1920) 9, 11

United States v. Southern Pacific Co., 259 U.S. 214 (1922) 9

United States v. Swift & Co., 286 U.S. 106 (1932) 10

United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912) 33, 34, 35

United States v. Topco Associates, 405 U.S. 596 (1972) 15

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) 49

United States v. Union Pacific R.R., 226 U.S. 6 (1912) 11, 40

United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd p.c.*, 347 U.S. 521 (1954) 13

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 17, 41, 44

United States v. United States Steel Corp., 251 U.S. 417 (1920) 8, 10, 40

United States v. Yellow Cab Co., 332 U.S. 218 (1947) 13

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 23

LEGISLATIVE MATERIALS:

Sherman Act, 15 U.S.C. §§ 1, 2 (1976) . . . . . passim

21 Cong. Rec. 3151-52 (1890), reprinted in Trusts: Bills and Debates, S.Doc. 147, 57th Cong., 1st Sess. (1903) 9

Table of Authorities Continued

Page

OTHER AUTHORITIES:

P. Areeda & D. Turner, ANTITRUST LAW (1978) 8, 18, 19, 44

R. Bork, THE ANTITRUST PARADOX (1978) 40

Breyer, *The Problem of the Honest Monopolist*, 44 ABA Antitrust L.J. 194 (1975) 8

L. Fuller, THE MORALITY OF LAW (1964) 17

Noble, *"No Fault" Monopolization: Requiem or Rebirth for Alcoa?* 17 N. Eng. L. Rev. 777, 739-805 (1982) 8

R. Perkins, CRIMINAL LAW, (1957) 13

T. Peters & R. Waterman, IN SEARCH OF EXCELLENCE (1982) 16

A. Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (1776) (R. Campbell, A. Skinner & W. Todd eds. 1981) 22

L. Sullivan, ANTITRUST (1977) 17

Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207 (1969) 8, 13

Turner, *The Scope of "Attempt to M[illegible]ize,"* 30 The Record of the Ass'n of the Bar of the City of New York 487 (1975) 9

Comment, *Draining the Alcoa "Wishing Well": The Section 2 Conduct Requirement after Kodak and CalComp*, 48 Fordham L. Rev. 291 (1979) 10

Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 Colum. L. Rev. 441 (1983) . . 35

Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720 (1974) 35

U. S. COMPETITIVENESS IN THE WORLD ECONOMY (B. Scott & C. Lodge eds. 1985) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-510

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

---

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 738 F.2d 1509 (1984) and appears at Pet. App. 1a.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1984. Pet. App. 40a. By order of July 31, 1984, the court of appeals stayed its mandate until September 2, 1984. Pet. App. 41a. By order of August 28, 1984, that court further stayed its mandate until October 2, 1984. Pet. App. 42a. On September 28, 1984 the petitioner filed its Petition for a Writ of Certiorari. On December 3, 1984, this Court granted the petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, Title 15

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Petitioner, Aspen Skiing Co. ("Ski Co."),[1] was founded in 1946. Since the 1960's, it has operated three skiing mountains near Aspen, Colorado—Aspen Mountain (also called "Ajax"), Snowmass, and Buttermilk. Respondent, Aspen Highlands Skiing Corporation ("Highlands"), since 1958, has operated another skiing mountain nearby—Aspen Highlands. All four mountains have been operated pursuant to Forest Service permits.

Skiers generally use one mountain per day. Each firm issues single-day and multi-day lift tickets. Ski Co.'s have always been usable at any of its mountains. A joint six-day ticket, usable at both firms' mountains, was issued from 1962-63 through 1971-72 and from 1973-74 through 1977-78. J.A. 26, 153-55; Tr. 170. Its price was set by agreement of the firms, and revenues were divided on the basis of estimated usage of each firm's facilities, except that in 1977-78 fixed percentages were used. From 1973-74 through 1976-77, neither firm offered its own six-day ticket.[2]

In December, 1975 the Colorado Attorney General attacked, under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 2 (1982), the conduct involved in setting the price of the joint ticket. (Ex. X, Tr. 229). A 1977 consent decree permitted the ticket but required each firm to set its own ticket prices unilaterally (Ex. 26; Tr. 229).

---

[1] This action was brought against Aspen Skiing Corporation and two wholly-owned subsidiaries. The three defendants were subsequently reorganized into a partnership known as Aspen Skiing Company, which was substituted for its predecessors. For convenience, we treat Ski Co. as having existed at all relevant times.

[2] Each firm offered a basic ticket, its own daily ticket, in every year from 1962-63 through 1980-81 (Tr. 1508, 157, 216-17).

Ski Co. offered its own seven-day ticket in 1962-63 through 1964-65, J.A. 154, and a six-day ticket in 1965-66, 1966-67, 1969-70, 1972-73, and 1977-78 through 1980-81, J.A. 79, 154-55. In 1967-68 and 1968-69, it

Footnote continued on next page

During the following season, 1977-78, the joint ticket was continued, but for the first time since 1972-73 Ski Co. offered its own six-day ticket in competition with it. During the next three seasons, 1978-79, 1979-80, and 1980-81, Ski Co. effectively declined to participate in a joint ticket,[3] and each firm offered a competing six-day ticket package. Ski Co.'s sole reason for refusing to continue the joint ticket was that it thought it could do better on its own, and did not want to help Highlands. *See* pp. 44-45, *infra*.

In 1979 Highlands filed this action alleging violations of §§ 1 and 2 principally due to Ski Co.'s withdrawal from the joint ticket. J.A. 1. At a Ski Co. board meeting, one

---

Footnote 2 continued

offered one-week tickets. J.A. 154. In addition, at various times, it offered two-day, three-day, four-day and five-day tickets. J.A. 81-83, 139, 154-55. *See generally* Ex. 47, Tr. 181 (not excluded from exhibit list p. 4).

The record covers Highlands' offerings in detail only for 1970-71 and 1972-73 forward. Highlands offered its own six-day ticket in 1978-79 through 1980-81 (Ex. 15, Tr. 180). It offered its "Adventure Pack," described in text, *infra*, in those years. *Id.* In 1972-73, when there was no joint ticket, it offered a ten-day ticket. *Id.* It offered a three-day ticket in each year from 1973-74 through 1980-81. *Id.*

Thus, the years in which no joint ticket was offered were 1972-73, 1978-79, 1979-80, and 1980-81. In 1972-73, Ski Co. offered a six-day ticket; and Highlands, a ten-day ticket. In each of the other years when no joint ticket was offered, each firm offered its own six-day ticket. Highlands did not offer a six-day ticket of its own in any year when a joint ticket was offered. Ski Co. did not offer a six-day or seven-day ticket of its own when a joint ticket was offered in 1973-74 through 1976-77. It did offer a competing six-day ticket in 1977-78, the year before it withdrew from the joint ticket arrangement.

[3] In fact, Ski Co. offered to continue the joint ticket if Highlands would accept a 12.5% share of the revenues from it. Highlands refused, and contended that Ski Co. knew its offer would be unacceptable and intended that it be rejected. We treat the verdict as sustaining Highlands' interpretation.

member of management commented in reference to the Colorado Attorney General's suit and Highlands' action: "You are damned if you do and you are damned if you don't." J.A. 55.

The case was tried to a jury in June, 1981. Highlands' principal claim was that Ski Co. had monopolized by refusing to cooperate with Highlands: by refusing to continue the joint ticket, by refusing to facilitate Highlands' substitute joint ticket scheme, and by offering its own six-day ticket in competition with the joint ticket and later with Highlands' joint ticket scheme.

The jury was instructed that it could find both a relevant product market and submarket and both a relevant geographic market and submarket. It found that the relevant product market was "[d]ownhill skiing at destination ski resorts," and that the relevant product submarket was "[d]ownhill skiing services in Aspen [sic] including multi-area, multi-day lift tickets." J.A. 186-87. It found that the relevant geographic market was "North America," and that the relevant geographic submarket was the "Aspen area." J.A. 187. It also found that Ski Co. had monopoly power during the four skiing seasons that constitute the damage period (1977-78 through 1980-81). These findings are not challenged in this Court.

Although the court of appeals refers to "the market for [multi-day, multi-mountain] tickets," Pet. App. 20a-21a, no such market was claimed at trial, and none was found by the jury.[4] Rather, as just noted, the jury found that multi-area, multi-day lift tickets were included in the submarket of downhill skiing services in Aspen.

The jury further found for Ski Co. on the § 1 claim and for Highlands on the monopolization claim. It awarded

---

[4] Highlands also invokes this non-existent market in its Opposition to Petition for Writ of Certiorari 17.

damages of $2.5 million, trebled to $7.5 million.[5] Attorneys' fees and interest have since been added.

The trial court entered an injunction requiring Ski Co. to cooperate with Highlands in offering a joint ticket. J.A. 192-96. The two firms must confer and agree on the ticket price. Where they have not agreed, the court has set the price, terms, and conditions of the joint ticket; and has resolved disputes about allegedly excessive competition between Ski Co.'s own tickets and the joint ticket. The trial court, recognizing the pro-competitive character of Ski Co.'s six-day ticket, allowed it to continue. J.A. 196. Although Highlands filed a cross-appeal, it did not contest the trial court's upholding of that ticket.

SUMMARY OF ARGUMENT

Preservation of the incentive to compete requires that attainment of monopoly power through competition on the merits not be penalized as soon as it is achieved. Substantial exclusionary conduct should be a required element of monopolization. Under any reasonable definition of "exclusionary conduct," Ski Co.'s refusal to engage in joint marketing with its horizontal competitor was not exclusionary. It did not restrain Highlands from bringing its services to market; it did not restrain consumers from choosing between the two firms on the merits; it was not predatory; and it did not depend for success on the exercise of monopoly power. The joint marketing arrangement demanded by Highlands would have depressed competition

[5] The jury's award included 1977-78, when there had been a joint ticket, and Ski Co. had offered its own competitive six-day ticket. On appeal, Ski Co. contended that its own ticket was not anti-competitive and that therefore the damage award could not stand. The court did not deny that Ski Co.'s own six-day ticket was lawful, but it upheld the award. Pet. App. 28a-29a n.21. The court's finding that the 1977-78 division of revenues was unfair to Highlands (Pet. App. 29a-31a) puts the court in the dubious business of evaluating the worth to the parties of consensual transactions. See pp. 26 n.28, 49-50, *infra*.

and given it a free ride. Ski Co.'s refusal to sell its lift tickets to Highlands or to accept Highlands' coupons for admission to Ski Co.'s facilities was also not exclusionary. It was merely a corrollary of Ski Co.'s decision to compete, rather than cooperate, with Highlands. Ski Co.'s offering of its own six-day ticket was not exclusionary; it did not restrain Highlands or consumers.

The essential facilities doctrine does not apply to this case. There was no leveraging of monopoly power in one market to exclude or distort competition in another. Ski Co. was not vertically integrated, and produced no goods or services needed by Highlands to produce or deliver its own services. Ski Co. had no essential facility. Highlands sought to buy from Ski Co. a service that competed with its own service. Highlands is in the same position as any firm that over many years has opportunities to take long lead-time steps to remain competitive, but fails to take them.

Neither the logic of § 2 nor any decision of this Court permits a finding of monopolization, in the absence of exclusionary conduct, on the basis merely of monopoly power plus improper intent. Moreover, there was no evidence, from conduct or from statements, that Ski Co.'s intent was anti-competitive, rather than competitive.

Ski Co.'s refusal to cooperate is lawful under the *Monsanto-Colgate* doctrine.

ARGUMENT

Introduction: The Development Of The Law Of Monopolization

One rule and two themes relevant here have persisted throughout the history of § 2. The rule is that the statute does not prohibit "mere" monopoly, or monopoly "in the concrete".[6] The first theme concerns the types of conduct

[6] Standard Oil Co. v. United States, 221 U.S. 1, 60-62 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179-83 (1911); United

Footnote continued on next page

that, in the gaining or retaining of monopoly power, constitute monopolization. The second concerns the relevance of anti-competitive intent.

The logic of § 2—the incentive to compete that it (with the rest of the antitrust laws) seeks to promote—requires that the attainment of market power, or even monopoly, through proper means not be penalized as soon as it is achieved. *United States* v. *United States Steel Corp.*, 251 U.S. at 450-51. If it were, the law would deter firms having or even approaching substantial market power from competing, and thus would be "at war with itself." *United States* v. *American Tobacco Co.*, 221 U.S. at 180.[7]

The Senate debates on the Sherman Act reflect a clear distinction between monopoly attained by superior skill in

---

Footnote 6 continued

States v. Unites States Steel Corp., 251 U.S. 417, 450-51 (1920); United States v. International Harvester Co., 274, U.S. 693, 708 (1927); United States v. Aluminum Co. of America, 148 F.2d 416, 429-32 (2d Cir. 1945) ("*Alcoa*"); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2740 n.14 (1984).

[7] It has been argued that mere monopoly plus long persistence and a likelihood that judicial intervention can restore competitive conditions should justify under § 2 equitable relief for the Government, but not treble damages or criminal prosecution. This approach would preserve the finding of a violation, but not the rationale, in *Alcoa*. *See, e.g.*, Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1217-25 (1969); Breyer, *The Problem of the Honest Monopolist*, 44 ABA Antitrust L.J. 194, 200 (1975); 2,3 P. Areeda & D. Turner, ANTITRUST LAW ¶¶ 311-13, 623 (1978) [hereinafter cited as "Areeda & Turner"]. *Contra*, Noble, *"No Fault" Monopolization: Requiem or Rebirth for Alcoa?* 17 N. Eng. L. Rev. 777, 799-805 (1982). The decision in this case need not affect the issues whether it is appropriate to have different standards under § 2 for Government equity suits and private treble damages actions, and, if so, under what standards the Government should be entitled to relief.

competition on the merits[8] and monopolization, involving "something like the use of means which made it impossible for other persons to engage in fair competition, like the engrossing, the buying up of all other persons in the same business."[9] This distinction was refined and applied in this Court's early § 2 cases.[10] There, following common law precedents, the Court also inferred improper intent from the exclusionary nature of conduct.[11] It does not appear,

---

[8] This category of conduct is what Judge Learned Hand later described in *Alcoa* as "honestly industrial." 148 F.2d at 431. *See also* Turner, *The Scope of "Attempt to Monopolize,"* 30 The Record of the Ass'n of the Bar of the City of New York 487, 494 (1975).

[9] 21 Cong. Rec. 3151-52 (1890), reprinted in Trusts: Bills and Debates, S. Doc. 147, 57th Cong., 1st Sess. (1903). The explicators of § 2, Senators Edmunds and Hoar, probably drafted the legislation that became the Sherman Act. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 n.10 (1940).

[10] Standard Oil Co. v. United States, 221 U.S. at 75-76 (development of business power by usual or normal methods contrasted with methods reflecting an intent to exclude competitors); United States v. American Tobacco Co., 221 U.S. at 181 ("mere exertion of the ordinary right to contract and to trade" distinguished from "methods devised in order to monopolize the trade by driving competitors out of business"); United States v. Reading Co., 253 U.S. 26, 57 (1920) ("normal expansion to meet the demands of a business growing as a result of superior and enterprising management" distinguished from "deliberate, calculated purchase for control"); United States v. Southern Pacific Co., 259 U.S. 214, 230 (1922) ("normal and natural growth and development" distinguished from "the formation of holding companies, or stock purchases, resulting in the unified control of different roads or systems, naturally competitive"). *See also* FTC v. Curtis Publishing Co., 260 U.S. 568, 582 (1923).

[11] *E.g.*, Standard Oil Co. v. United States, 221 U.S. at 51-58, 76; United States v. American Tobacco Co., 221 U.S. at 182-83 ("wrongful purpose" "established" by six categories of conduct and circumstances). *Cf.* United States v. Patten, 226 U.S. 525, 543 (1913) (no specific intent required for violation of § 1; only relevant intent is that to engage in the conspiracy that violates the act); International Harvester Co. v. Missouri, 234 U.S. 199, 209 (1914) (combinations to defeat competition not saved by good intentions). On rare occasion, extrinsic evidence of subjective intent was cited. *E.g.*, United States v. Reading Co., 253 U.S. at 44-45.

however, that intent independent of conduct was a significant factor in any of the decisions.[12]

During the late 1940's, when America enjoyed world supremacy, the original understanding of the conduct element of monopolization was challenged in decisions addressing Government attacks on entrenched monopolies.[13] The lead was taken by Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) ("*Alcoa*"). In language susceptible of varying interpretation, he suggested that a monopoly can escape condemnation under § 2 only where the firm enjoying it is "the passive beneficiary . . ., following upon an involuntary elimination of competitors by automatically operative economic forces," *id.* at 430.[14] If the conduct that brought about or maintained the monopoly tended to make it

[12] In Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (Holmes, J.), the Court held, in the context of a charge of attempt to monopolize, that otherwise lawful acts, when bound together as part of an unlawful plan, may be unlawful. That conclusion was not specific to § 2, but followed from the principles governing the general law of attempt. The specific intent required for attempt to monopolize is not required for monopolization. United States v. Griffith, 334 U.S. 100,105 (1948).

[13] These cases are sometimes viewed as taking a "structural" (as distinguished from a "conduct") approach to § 2 issues. *E.g.* Comment, *Draining the ALCOA "Wishing Well": The Section 2 Conduct Requirement After Kodak and CalComp*, 48 Fordham L. Rev. 291 (1979).

[14] *Alcoa* is sometimes regarded as having recognized as lawful a monopoly resulting from "superior skill, foresight and industry," 148 at 430, or from conduct that is "honestly industrial," *id.* at 431. It is not clear that Judge Hand in fact recognized an exception in such terms from the prohibitions of § 2. With respect to monopolies resulting from natural circumstances, changes in demand or efficiency, or superior skill, etc., he commented (i) that "a strong argument can be made" against their condemnation, (ii) that the most extreme expression of this view was in *U.S. Steel* and *Harvester* [*supra*, n.6], and (iii) that "whatever authority [this view] does have was modified by the gloss of Cardozo, J. in *United States v. Swift & Co.*, 286 U.S. 106, [116 (1932)]."

Footnote continued on next page

harder for rivals to enter or survive and was "not inevitable," it was unlawful, *id.* at 431.

Alcoa's attenuation of the conduct element (with its paradoxical ambiguities) was apparently adopted by this Court in *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946) ("*American Tobacco (III)*"), and *United States* v. *Griffith*, 334 U.S. 100 (1948). *See also United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 171-73 (1948); *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 390-91 (1956). In *American Tobacco (II)*, the Court, in *dicta*, endorsed some of the principal passages in *Alcoa*, 328 U.S. at 811, 813-14, and also quoted approvingly: ". . . trade and commerce are 'monopolized' . . . when, as a result of efforts to that end, such power is obtained that a few persons acting together can control . . . prices. . . ."[15] The critical phrase, "efforts to that end," is undefined. *American Tobacco (II)* involved a conspiracy, not unilateral conduct; and the Court noted that defendants had engaged in exclusionary conduct, which was evidence of a subjective intent to exclude. 328 U.S. at 804.

Footnote 14 continued

148 F.2d at 430. Moreover, he expressed the view that to "interpret 'exclusion' as limited to maneuvres not honestly industrial, but actuated solely by a desire to prevent competition . . . would . . . emasculate the Act," *id.* 148 F.2d at 431. It is not entirely clear what Judge Hand would have said about manoeuvres "honestly industrial" actuated by a desire to maintain monopoly power through vigorous competition.

[15] 328 U.S. at 811. The passage is from United States v. Patten, 187 F. 664, 672 (C.C.S.D.N.Y. 1911), *rev'd on other grounds*, 226 U.S. 525 (1913). The quotation continued: "It is not necessary that the power thus obtained should be exercised. Its existence is sufficient." 328 U.S. at 811, quoting 187 F. at 672. This point relates not to the acquisition or maintenance of monopoly power, but rather to whether, once acquired and maintained, it is exercised to raise prices or exclude competitors. Monopolization does not require actual raising of prices or exclusion of competitors. *E.g.*, United States v. Union Pacific R.R., 226 U.S. 61, 88 (1912); United States v. Reading Co., 253 U.S. at 58.

In *Griffith*, 334 U.S. at 107, the Court observed:

> [M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 . . . is aimed, *inter alia*, at the acquisition or retention of effective market control. [*Alcoa.*] Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of §2, provided it is coupled with a purpose or intent to exercise that power. [*American Tobacco (II)*] . . . [T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

The first sentence says that monopoly, however acquired, *may* be condemned; by implication, not all monopolies are condemned. The Court noted that ownership of the one theatre in a one-theatre town would not be unlawful, nor would an exclusive license to exhibit a film. 334 U.S. at 106. The second sentence suggests that condemnation-or-not depends on how the monopoly was acquired or retained, *i.e.*, by what kind of conduct. The third sentence suggests, however, that the determining factor is not conduct, but the purpose or intent with which the monopoly was to be used. *But see* 334 U.S. at 105. The fourth sentence seems to define a more substantial exclusionary conduct element than that contemplated in *Alcoa*: conduct involving the abuse of monopoly power. The Court found Griffith to have engaged in such conduct by leveraging its monopoly power in closed towns to gain advantage in open towns.

What is most surprising in *Griffith* is the survival of any reference to purpose or intent. Judge Hand had "disregard[ed] any question of 'intent.'" 148 F.2d at 431. No specific intent to gain or maintain a monopoly was required; the only intent necessary was that to engage in the acts that brought about or preserved the monopoly. *Id.* at 432.

Finally, in *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), the Court summed up the offense in the formula relied on by lower courts ever since:

> The offense of monopoly under § 2 . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

The formula fails to make clear whether the distinction is between two kinds of conduct or two kinds of intent. It is unclear what is added by "willful," a term often requiring a specific mental element beyond general intent. R. Perkins, CRIMINAL LAW 820-22 (1957). Presumably, any competitive strategy is willful. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 Harv. L. Rev. 1207, 1219 (1969). In light of Judge Hand's observation that "no monopolist monopolizes unconscious of what he is doing," 148 F.2d at 432, quoted in *Griffith*, 334 U.S. at 105, understanding of the second element of the *Grinnell* formula is not aided by the Court's observation that because "this monopoly power was consciously acquired," there was no need to consider the burden of proof on whether the monopoly was attained by proper means, 384 U.S. at 576 n.7. Nor is light shed by the statement that "this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose," *id.* at 571, particularly when coupled with the comment that "this monopoly was achieved in large part by unlawful and exclusionary practices." *Id.* at 576.

Even during the period of *Alcoa*, *American Tobacco (II)*, and *Griffith*, Judge Hand's view of §2 was not universally accepted. *See, e.g.*, *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227-28 (1947); *United States* v. *New York Great A. & P. Tea Co.*, 175 F.2d 79, 82, 87-88 (7th Cir. 1949); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 342-43 (D.Mass. 1953), *aff'd p.c.*, 347 U.S. 521 (1954).

In recent treble damage actions dealing with aggressive competitive conduct by large firms, many courts have re-emphasized the public importance of high standards of performance and vigorous competition even by firms with dominant positions in U.S. markets.[16] This emphasis derives from the legislative origins of the Sherman Act and the cases that established its fundamental interpretation. See pp. 7-9, *supra*. It also carries out this Court's clear directive that, under this Act, competition is the *only* value to be considered, *e.g.*, in Rule-of-Reason analysis under §1. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691-92, 695 (1978); *NCAA* v. *Board of Regents*, 104 S. Ct. 2948, 2969 (1984). There is no reason why the fundamental value should be different under §2. The congressional policy of competition requires substantial exclusionary conduct as an element of monopolization, at least in private actions. Despite *Alcoa*, *American Tobacco (II)*, and *Griffith*, such conduct has consistently been required. *MCI Communications Corp.* v. *AT&T*, 708 F.2d at 1108 n. 35.

---

[16] *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1114 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); Transamerica Computer Co. v. IBM, 698 F.2d 1377 (9th Cir.), *cert. denied*, 104 S. Ct. 370 (1983); Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 281 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); California Computer Products, Inc. v. IBM, 613 F.2d 727, 742, 744 (9th Cir. 1979); Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1980); Telex Corp. v. IBM, 510 F.2d 894, 927 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); Travelers Ins. Co. v. Blue Cross of W. Pennsylvania, 481 F.2d 80 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 657 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961); ILC Peripherals Leasing Co. v. IBM, 458 F. Supp. 423, 444 (N.D. Cal. 1978), *aff'd p.c.* sub nom. Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981); Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 718-19 (D. Hawaii 1964), *aff'd p.c.*, 401 F.2d 182 (9th Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

The instant case does not present the specific (and, we submit, more difficult) issues addressed in the recent dominant firm cases. Like them, however, it presents the threshold philosophical question whether a firm with large market share has a duty under §2 to cooperate with a smaller horizontal rival. If the answer here is yes even as to a joint marketing arrangement, then those cases were wrongly decided, and a new jurisprudence of mandatory horizontal cooperation will have to be developed. If the answer here is no, the issues in those cases still remain open for review by this Court.

I. EVEN A FIRM WITH MONOPOLY POWER HAS NO DUTY, UNDER PAIN OF TREBLE DAMAGE LIABILITY, TO ENGAGE IN JOINT MARKETING WITH A COMPETITOR.

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States* v. *Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116 (1975).[17] Under *any* of the views of §2 discussed *supra*, an unintegrated firm's refusal to enter with a competitor into a treaty for joint marketing should not be held to violate §2 and should not subject the firm to liability for millions of dollars of trebled damages.

---

[17] *See also* United States v. Topco Associates, 405 U.S. 596, 610 (1972), *quoted in* Community Communications Co. v. City of Boulder, 455 U.S. 40, 56 n.19 (1982); Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 538 (1983) ("our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 291 ("The purpose of the Sherman Act is not to maintain friendly business relations among firms in the same industry. . . .").

A. In a Private Treble Damage Action, Substantial Exclusionary Conduct Should be Required for Monopolization.

There are great difficulties with any view of monopolization that attenuates the requirement of exclusionary conduct, and would, in effect, impose on firms with large market share a duty to eschew robust competition and so conduct their business that less efficient rivals may enter, consume productive resources, survive, and prosper.

First, to penalize conduct that is honestly industrial (albeit "not inevitable") would dull the incentive of firms with market power to go on competing and performing efficiently, and would cost consumers some of the benefits of efficiency. It would erode the competitive vigor of American firms that have large domestic market shares, but also compete (and may well not be dominant) in foreign markets.[18] A corporate culture taught not to respond energetically to competitive opportunities at home is likely over time to lose its zeal for such opportunities abroad,[19] with obvious losses for our balance of payments and our national standard of living. *See* U.S. COMPETI-

[18] Although skiing is not a major American industry, Colorado ski resorts compete in international markets. J.A. 32, 74, 163; Ex. 75, p.5, Table 1, Tr. 181 (not excluded from exhibit list, p.6). Indeed, the jury found that North America as a whole is a relevant geographic market. J.A. 186-87.

[19] It is no accident that, in most of the cases, cited in n. 16, *supra*, the defendants were technologically innovative—*e.g.*, IBM, AT&T, Kodak. Even where the aggressive conduct at issue was not, itself, technological innovation, it flowed from the same corporate culture that fostered innovation. Leading firms' effective innovations, their successful disturbances of the comfortable status quo—whether in product design, promotion, pricing or something else—are tempting targets for treble damage actions, but also a principal basis for the future competitiveness of the American economy. On the concept of "corporate culture," see T. Peters & R. Waterman, IN SEARCH OF EXCELLENCE (1982).

TIVENESS IN THE WORLD ECONOMY (B. Scott & G. Lodge eds. 1985). Limiting the conduct element to exclusionary conduct would permit market incentives to elicit vigorous competitive conduct.

Second, if honestly industrial conduct is penalized, there are no useful guidelines for distinguishing lawful from unlawful conduct. Laws that are supposed to guide conduct but fail to do so cause great harm. L. Fuller, THE MORALITY OF LAW 33-94 (1964). Clarity of standards is particularly important in the field of antitrust, where private conduct generally is planned, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 445 (1978), and often counseled, the penalties for violation are severe, and, therefore, the law's opportunity to guide conduct is large. Although an exclusionary conduct standard does not remove all uncertainty, it draws on relatively objective economic analysis to guide firms, courts, and juries.

Third, where conduct is competitive on the merits and the law is unclear, imposition of penalties is unfair. People in business know that the antitrust laws urge them to compete. If they are penalized for trying to compete or for competing too successfully or are told they also have a *duty to cooperate with rivals*, then they are victimized not merely by unclear laws, but by laws internally in conflict. *See* L. Sullivan ANTITRUST §34 (1977); *see also* Tr. 420. An exclusionary conduct standard, properly applied, conforms with normal expectations and is not unfair.

Fourth, the gist of a private treble damage action is to redress (three times over) private injury and deter future violations. *American Society of Mechanical Engineers* v. *Hydrolevel Corp.*, 456 U.S. 556, 575 (1982). Substantial antitrust injuries do not result from structure (or from structure plus intent), but only from substantial exclusionary conduct. *Cf. Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). What is to be deterred, presumably, is not lawfully acquired market power, *see* n. 6, *supra*, nor

honestly industrial conduct, but exclusionary conduct, *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465, 472 (1982) ("forbidden practices"); *Brunswick Corp.*, v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 485.

Fifth, without a substantial conduct element, §2 becomes a weapon to *attack* competition. Here, as in *Brunswick Corp.*, 429 U.S. at 488, the damages awarded Highlands were "the profits [it] would have realized had competition been reduced."

Finally, there is no justification for shifting money (even single damages) to a private antitrust plaintiff from a defendant that has done nothing wrong. 3 Areeda & Turner ¶630c. It is Government-brought cases alone that have spawned the range of views of the conduct element of §2. Areeda and Turner comment: "We know of no case in which damages were granted without [avoidable and improper] behavior by the defendant." 2 *Id.* ¶311c, at 34.

For these reasons, substantial exclusionary conduct should be a required element of monopolization, at least in private treble damage actions.

B. Refusal to Engage in a Joint Marketing Arrangement with a Horizontal Competitor is, Under any Reasonable Definition, Not "Exclusionary".

The following definitions of "exclusionary" (including predatory) conduct,[20] are representative:

> "[E]xclusionary" behavior should be taken to mean conduct other than competition on the merits, or other

[20] The term "exclusionary" is used herein so as to leave open the possibility that one and the same practice may be non-exclusionary when carried out by a firm with little or no market power but exclusionary when carried out by a firm with monopoly power. What determines whether the practice is exclusionary is not the intent with which it is carried out but its competitive effects in the actual circumstances.

> than restraints reasonably "necessary" to competition on the merits, that reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power. 3 Areeda & Turner ¶ 626c.
>
> [T]he plaintiff must show that the defendant's acts "unnecessarily excluded competition". . . . The . . . acts are properly analyzed analogously to contracts, combinations and conspiracies under §1: the test is whether the . . . acts, otherwise lawful, were *unreasonably* restrictive of competition. . . . While this "in large measure" has the effect of making acts of monopolization "merely the end products of conduct which violates § 1," "that is not always true." [*Griffith*, 334 U.S. at 106.] Section 1 is limited to concerted activity and contractual restraints, while under § 2, individual activity may also give rise to liability. *California Computer Products, Inc.* v. *IBM*, 613 F.2d at 735-36 (emphasis in original).
>
> The first factor is whether or not the acts are ordinary business practices typical of those used in a competitive market, and secondly whether the acts constitute the *use* of monopoly power. *Telex Corp.* v. *IBM*, 510 F.2d at 925-26 (emphasis in original).

The task is to distinguish conduct that §2 should foster from conduct it should condemn. Probably no verbal formula is always apt. We suggest the following test (i) fully responds to the policies of §2, (ii) adequately reflects the general concerns expressed in the definitions just quoted, and (iii) is appropriate for the specific competitive concerns in the instant case:

> whether the conduct (a) substantially restrained the opportunity of Highlands to produce its own services and offer them to consumers, to be purchased or rejected on their merits; (b) substantially restrained the opportunity of consumers to choose on the merits between the services offered by Highlands and those offered by Ski Co.; (c) depended for its long-term success on the destruction of Highlands; or (d) could be engaged in successfully only by a firm with monopoly power.

This test is very demanding. Conduct that imposes a restraint may sometimes be justified by specific redeeming competitive benefits. Here, in view of the verdict, the only redemption we claim flows from the general competitive benefit of Ski Co.'s undisputed desire to compete with Highlands rather than help it through cooperation. The test does not require that conduct be supported by an affirmative business justification (other than a desire to compete). If conduct does not impose the kinds of substantial harmful restraints that raise antitrust concerns, is not predatory, and is not dependent on monopoly power, then it needs no justification beyond a desire to compete rather than cooperate. The philosophy of antitrust law and Anglo-American law generally is to permit (and not require justification for) conduct unless it is harmful in ways the law seeks to prevent.

1. Ski Co.'s Refusal to Continue the Joint Ticket Was Not Exclusionary.

The refusal to continue the joint ticket did not restrain Highlands' opportunity to offer its own skiing services to the market. Highlands remained totally free and fully able to offer its services, and it did so.

The refusal did not restrain consumers' freedom to choose between Highlands and Ski Co. or secure to Ski Co. the patronage of any skier who did not prefer its facilities to Highlands'. Ski Co. had to earn patronage through the means customary in the industry (principally quality and promotion). Each firm offered single-day tickets, so skiers could buy exactly as many days at each firm's facilities as they chose. Had there been substantial effective demand for a six-day ticket for skiing at both firms' facilities, it presumably would have been provided. For example, a substantial tour packager could have demanded a two-day ticket for Highlands and a four-day ticket for Ski Co., or

any other such combination. *Cf.* Tr. 885,892-93.[21] The cost of the tickets would have been higher than that of a discounted single-firm six-day ticket, but the increase would have been insignificant.[22] Ski Co. also had a liberal refund policy, J.A. 155-61, so even purchasers of Ski Co. tickets were free to ski at Highlands without significant loss.

From the perspective of consumers, the joint ticket presents a risk of collusion on prices generally and other matters. Although that risk does not warrant *per se* condemnation, imposition of a mandatory joint ticket on the supposed authority of §2 stands the law on its head.

The refusal to continue the joint ticket was not predatory because the success of Ski Co.'s policy did not depend on the destruction of Highlands. The refusal merely cleared the way for Ski Co. to compete energetically for skier patronage, in the hope of earning additional patronage.

---

[21] There was evidence that Ski Co. refused to sell single-day lift tickets in bulk to Highlands, J.A. 42-43, but no evidence that it refused to sell any tickets to any tour packager, group, or individual skier. There was evidence that Ski Co. was responsive to demand from skiers. In 1978-79 Ski Co. initially eliminated its three-day ticket, but restored it in response to strong consumer demand. J.A. 602. Similar demand for any other kind of ticket, including a joint ticket, would presumably elicit a similar response because the skiers who fly to Aspen can fly elsewhere in North America. That is how a healthy market works.

[22] Customers of Highlands and Ski Co. are mobile, well-educated, and affluent. J.A. 32, 74, 89-90. Even excluding transportation to and from Aspen, skiers staying in Aspen pay per day (for lodging, meals, entertainment, etc.) eight to nine times the cost of a lift ticket. Tr. 773-74. Ski Co.'s discount on its three-area, six-day ticket was $2/day from the daily price of $15 in 1978-79 and $16 in 1979-80; in 1980-81, the discount was $1/day from the daily price of $18. Ex. 47, Tr. 181 (not excluded from exhibit list, p. 4). The discount was, thus, immaterial. Tr. 872. Highlands' expert opined that, for skiers in Aspen, lift ticket prices within the range relevant here are not important. J.A. 93.

The refusal did not require the exercise of monopoly power. No market power is needed to conduct business without a joint-marketing arrangement. Here, Ski Co.'s strategy depended not on market power, but only on its having facilities it believed would attract skiers in the absence of cooperation.

Even under the most attenuated view of the conduct element—*Alcoa*'s "not inevitable" standard—a refusal to cooperate is not monopolizing conduct. Even *Alcoa* requires some affirmative conduct that creates a barrier to rivals' entry or survival. Ski Co.'s conduct did not create any barrier. It removed the umbrella that had partially sheltered Highlands from the demands of the market.

Where a joint marketing arrangement is voluntary, each party presumably finds it to be in its interest, and consistent with its receiving the full benefits of its own productive (including promotional) expenditures: *i.e.*, the terms of the arrangement do not create an unacceptable free-rider problem. Because each firm is presumably the best judge of how to employ its economic resources,[23] its voluntary decision to join or not join the arrangement presumably reflects the use of its resources that is in fact most advantageous to it. If the arrangement is lawful,[24] these

[23] 1 A. Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (1776) (R. Campbell, A. Skinner & W. Todd eds. 1981).

[24] Any such arrangement is, of course, subject to scrutiny under § 1. The focus of such scrutiny would be whether any benefits to the competitive process arising from the arrangement outweigh any restraints on competition created by it, and whether the benefits could be achieved by means less restrictive of competition. The benefits, in the case of a ski area, might include enhanced competition with other ski areas. *See generally, e.g.*, NCAA v. Board of Regents, 104 S. Ct. 2948, 2961-62, 2967 (1984); Broadcast Music, Inc. v. CBS, 441 U.S. 1, 18-23 (1979); Continental T.V., Inc., v. GTE Sylvania Inc., 433 U.S. 36, 51-57 (1977).

voluntary decisions of individual firms will tend to produce the result economically most desirable for society.

Where as here, however, a court holds that a horizontal joint marketing arrangement may be imposed on an unwilling party, no inference of economic desirability arises. Because analyzing the effects of an arrangement is often difficult, *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343 (1982), the court may have failed to perceive free-rider problems or other harms to fullbodied competition. Indeed, the opposite inference can be drawn. The unwilling firm will not receive the full benefit of its productive expenditures, and will shift its strategies and behavior in ways it considers (and that presumably are) sub-optimal for itself, unduly beneficial to its rivals, and a less efficient use of its resources. This last point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979); *NCAA* v. *Board of Regents*, 104 S. Ct. at 2964. In the instant case, the court below failed to recognize economically significant harms to competition and free rider problems.

First, the joint ticket had the effect of depressing competition in national and North American advertising.[25] Highlands and Ski Co. had opportunities to compete at two geographic levels—a national or North American level, and a local, Aspen level. J.A. 75, 186-87; Tr. 2218. Each could try to sell its tickets to consumers (i) while they were planning their trips in their home communities, and (ii) to the extent that failed, after they arrived in Aspen.[26]

[25] The informational value of commercial advertising has led this Court to give it some First Amendment protection. *See, e.g.*, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[26] Well over 90% of Aspen skiers came from outside Colorado, Ex. 75, p.5, Table 1, Tr. 181 (not excluded from exhibit list, p.6), and 70-80%

Footnote continued on next page

Ticket sales at the North American or "in advance" level were made to individual skiers or to tour packagers. The standard stay in Aspen was one week, for six days of skiing. J.A. 102-03; *see also* Tr. 245-46. Skiers who booked package tours gained the convenience of obtaining all their tickets in advance. Tr. 949. There was also a small, but insignificant (*see* n.22, *supra*), discount for purchasing a six-day ticket from one firm. The packagers preferred to sell six tickets to gain increased commissions. J.A. 68-69. Thus, that segment of the market demanded six-day tickets, J.A. 68-69, 119, 129, and made them a standard item in ski tour packages, J.A. 104, 163-64, Tr. 814, 1772-73. Both Highlands and Ski Co. offered six-day tickets in response to strong market demand, arising from circumstances beyond their control. J.A. 41, 68-69, 119. Neither firm was attempting to force a six-day ticket on an unwilling market.

Highlands and Ski Co. had an opportunity to compete for inclusion of their respective tickets in ski tour packages. When no joint ticket was offered, each firm, responding to irresistible incentives, offered its own six-day (or longer) ticket. *See* n.2, *supra*. When, however, a joint ticket was offered during 1973-74 through 1976-77, neither firm offered its own six-day ticket, *id.*, presumably because to

Footnote 26 continued
had skied there before, Tr. 768, 1768. Ski Co. sold 80-85% of its lift tickets over its counters in the Aspen area, Tr. 633, and the remainder in advance as part of ski tour packages, J.A. 84-85. These figures are typical of Aspen generally, Ex. 75, p. 31, Table 33, Tr. 181 (not excluded from exhibit list, p. 6). Highlands' position at trial was that, during the years when a joint ticket was offered, Highlands and Ski Co., at the North American or national level, did not compete with each other but cooperated in promoting Aspen skiing as a whole. *See, e.g.*, J.A. 31-32, 34-36, 91. Highlands viewed its potential customers as aware of Aspen in general, but not of the specific mountains there, J.A. 41-42; and its preferred business strategy was to leave them in that relative ignorance until they arrived in Aspen, J.A. 35-36. Highlands did not contend that there was no possibility for competition between the firms at the North American level.

compete against a joint ticket would have been to compete against its rival and itself combined. Thus, the actual effect of the joint ticket was to destroy competition between the two firms' own six-day tickets. The firms continued to compete, in Aspen, for the patronage of skiers who purchased the joint ticket, but they essentially abandoned competition at the North American level, until Ski Co. in 1977-78 offered its own six-day ticket, in a transition to the elimination of the joint ticket.

Ski Co.'s refusal to continue the joint ticket re-opened the North American competition for the patronage of those 15-20% of skiers who book package tours, as well as those who ultimately buy six-day tickets in Aspen. Highlands' response was to offer, for the first time, its own six-day tickets. N.2, *supra*; J.A. 40-42. Thus, the joint ticket suppressed, and Ski Co.'s action stimulated, new competition.

Second, the joint ticket created a free rider problem. Highlands' marketing was based on the premise that it was not in Highlands' interest to pay for unilateral advertising outside of Aspen because skiers attracted by such advertising would spend a substantial part of their time at Ski Co. facilities. *See* J.A. 99. Highlands emphasized local advertising and did only occasional and limited national or North American advertising; it left that burden principally to Ski Co. *See* J.A. 31-32, 34-35, 64, 176-77; *see also* Tr. 1302.[27] Thus, Highlands gained a free ride on national advertising. J.A. 164-65. Highlands' owner, when asked why Highlands did not belong to the National Ski Areas Association, replied: "Because Aspen Skiing Corporation belongs, and I don't need to. They take care of the big things, and I take care of my operation." J.A. 177.[28]

[27] Highlands' national advertising became more substantial in 1977-78, J.A. 38-39, when Ski Co. began to offer its own six-day ticket in competition with the joint ticket.

[28] The joint ticket depressed Highlands' overall promotional efforts. Highlands' financial statements (Ex. S, Tr. 1292) show that, immedi-

Footnote continued on next page

When Ski Co. withdrew from the joint ticket, it began to promote not only Aspen in general but also itself. J.A. 107-10, 167-68.[29] At the time of trial, Ski Co.'s marketing expenses were quite large—$1.3 million budgeted for 1981-82, Tr. 874.[30] Similarly, in the first year without a joint ticket, Highlands increased its North American advertising by promoting its own Adventure Pack, though, in subsequent years, in the face of relative lack of success, it did not maintain that advertising. Ex. 93; J.A. 30-31, 63-64.

Footnote 28 continued

ately before and after the joint ticket was offered, total expenditures for advertising and promotion were higher than they were when the ticket was offered. The figures for advertising and promotion (from Schedule E of each set of statements) were:

1972-73	$136,624	(no joint ticket)
1973-74	69,168	
1974-75	80,638	
1975-76	100,769	
1976-77	86,017	
1977-78	125,847	(Ski. Co. six-day ticket offered)
1978-79	139,844	(no joint ticket)

Division of revenues from the joint ticket on the basis of estimates of usage, the method used in the years prior to 1977-78, J.A. 24-25, Tr. 185, would not necessarily have removed the free rider problem, even as to skiers who used the joint ticket. In 1977-78, the last year of the joint ticket, a one-day lift ticket for Highlands cost $12, a one-day lift ticket for Ski Co., $13; and the six-day joint ticket, $77 ($12.83 per day). Ex. 15, Tr. 180; Ex. 47, Tr. 181 (not excluded from exhibit list p. 4); Tr. 1367. Consequently, for a day of skiing at Highlands a skier using the joint ticket paid $.83 more than Highlands' own daily price. A division of revenues on the basis of usage would have rewarded Highlands with $.83 per skier visit above what it was otherwise charging—due solely to Highlands' association with Ski Co. in the joint ticket. It is not surprising that Ski Co. was unwilling to agree to a division of revenues on the basis of usage in 1977-78.

[29] Some joint efforts to promote Aspen continued. J.A. 47.

[30] The latest figure for Highlands' advertising and promotion expense, for 1979-80, is $83,950. Ex. S, schedule E, Tr. 1292.

Third, after Ski Co. withdrew from the joint ticket, Highlands continued to seek a free ride. Highlands was perfectly capable of fashioning a six-day skiing package to meet the demand of the ski tour segment of the market, and it did so. Its own six-day ticket competed head-to-head with Ski Co.'s. Although Highlands had 12 different lifts, J.A. 56, and claimed that its mountain was as good and as varied as Ski Co.'s three mountains together, J.A. 19-20, 60-61, 127, 129, it did not rely on tickets for its mountain alone. *See* n.2, *supra.*

Highlands also created its "Adventure Pack," consisting of three tickets for Highlands and three coupons (later traveler's checks and then money orders) for use at Ski Co.'s facilities or elsewhere. J.A. 61-62, 70, 72-73. Highlands promoted the Adventure Packs extensively, J.A. 47-49; Ex. 20, Tr. 180; Ex. 23A-N, Tr. 180. About 50% of them were sold to tour operators, J.A. 133, some of whom began to offer skiers a choice of lift tickets, J.A. 103.

The key to the Adventure Pack was its inclusion of skiing at Ski Co.'s facilities. Highlands was determined to associate itself with Ski Co., whether Ski Co. was willing or not. J.A. 40-42. The 1980-81 high season Adventure Pack, for $96, gave skiers three one-day tickets for Highlands and three $18 money orders, each good for a day at a Ski Co. mountain or for spending elsewhere. J.A. 67-68, 97-98. Thus, skiers were paying $96, but getting back $54 in a cash equivalent. Why didn't Highlands simply sell the three days at its mountain for $42 or add three more days of skiing at its own facilities? The answer is two-fold. First, as already shown, the ski tour segment of the market demanded a six-day not a three-day package. Second, the opportunity for three days of skiing at Ski Co. facilities made the package more attractive to skiers than would another three days at Highlands. J.A. 40, 97. That was so only because Ski Co. provided, and was known to provide, outstanding skiing. *Cf.* J.A. 127, 129. Highlands sought to

appropriate some of the benefit of Ski Co.'s investment in the quality of its facilities,[31] its promotion of those facilities, and its good will, J.A. 164-65, earned by satisfying consumers over many years.

When Highlands asked why Ski Co. would not maintain the joint ticket, Ski Co. responded: "Well, we will not support our competition." J.A. 46. Highlands' representative testified, "That response . . . shocked me. . . ." *Id.* Judge Hand was concerned that a firm with monopoly power might opt for the easy life of half-hearted performance. 148 F.2d at 427. The seductions of the easy life appeal as well to small firms sheltered from vigorous competition by cooperative arrangements with larger firms. The end of the easy life comes as a shock.

2. Ski Co.'s Refusal to Sell Lift Tickets to Highlands and its Refusal to Accept Highlands' Adventure Pack Coupons Were Not Exclusionary.

Ski Co. refused to sell its single-day lift tickets to Highlands for the latter to include in the 1978-79 Adventure Pack. J.A. 42-43. Highlands thereupon included coupons for use at Ski Co.'s mountains, but Ski Co. refused to honor them. J.A. 43-44; Tr. 1659.[32] These refusals were not exclusionary.

Like the refusal to continue the joint ticket, the refusals to sell lift tickets to Highlands and to honor Highlands'

[31] Ski Co.'s improvements in its skiing facilities and releated operations were extensive. *See, e.g.*, J.A. 34-37, 140-41, 144, 148-51. By contrast, the owner of Highlands could not recall when Highlands had last added a lift. Tr. 202. Another witness thought one had been added in 1975 or 1976. Tr. 302.

[32] In 1979-80 Highlands substituted traveler's checks for coupons in the Adventure Pack, and in 1980-81 it used money orders. Ski Co. accepted both the traveler's checks and the money orders. Tr. 548-49, 628.

coupons were merely refusals to engage in cooperative marketing with a competitor seeking to sell more of its own tickets than it could on its own. None of these refusals restrained Highlands' opportunity independently to offer its own services, or the opportunity of consumers to choose freely between the firms on the merits. Each firm offered a variety of tickets, enabling any skier to spend as many days with each as he or she wanted.

These refusals were not predatory. Ski Co. rejected coupons issued by Highlands because it sought to sell to actual or potential coupon-holders its own tickets, in a manner not giving Highlands a free ride. Ski Co.'s success did not depend on the destruction of Highlands, but on the attractiveness of Ski Co.'s own services. Ski Co.'s strategy was to extricate itself completely from joint marketing with Highlands, and compete successfully against Highlands on the merits. Ski Co.'s conduct, unlike any predatory conduct, was capable of sustaining itself without change or subsidy indefinitely.

Ski Co.'s refusal to sell tickets to Highlands or to honor its coupons, like the refusal to continue the joint ticket, did not depend on market power. *Any* firm that has a product it believes will be independently attractive to consumers can successfully refuse to cooperate with a competitor.

These refusals are also readily distinguishable from the conduct condemned in *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). There, a firm with a monopoly in the local newspaper market refused to sell advertising space to firms that also purchased advertising time from the local radio station. The case involved inter-market leveraging because the Journal was seeking to use its monopoly power in the newspaper market to distort competition in the radio market, which it had unsuccessfully sought to enter. The case also involved a demand for exclusive patronage (analogous to an exclusive dealership), where, because the customers were end-users rather than middlemen, there

were no even arguable distributional efficiencies to justify the severe restraint on the free choice of purchasers of advertising. That fact pattern does not fit the instant case. Here, there was no leveraging between different product markets, nor any demand for exclusive patronage. Ski Co. was perfectly happy to deal with skiers who also patronized Highlands. J.A. 82, 112-13, 157, 159. Ski Co.'s conduct did not restrict consumer choices, as the Journal's did. Ski Co. did not refuse to sell to any consumer, but only to a horizontal competitor.

Ski Co.'s refusal to sell lift tickets to Highlands and to honor Highlands' coupons may appear to be unusual conduct. But it was a response to conduct more unusual—Highlands' attempt to include Ski Co. involuntarily in a joint marketing arrangement. It is not normal business behavior for a firm to seek to coerce its horizontal competitor into a joint marketing arrangement by purchasing and reselling the competitor's products with its own. It is not normal for one firm to issue coupons for admission to another firm's facilities. Resistance to such coercive schemes should require no justification (beyond a desire to compete independently on the merits) where, as here, the resistance is not shown to be exclusionary.

Creation of a duty to sell products to a competitor or to accept coupons for one's own products issued by a competitor would lead to undesirable results, as this case illustrates.

First, any firm subject to such a duty would be vulnerable to coerced inclusion in unfair schemes. The Adventure Pack allocated a minimum of three days of patronage to Highlands and a maximum of three to Ski Co. J.A. 30. Since Ski Co. had more than three times the capacity of Highlands, Tr. 624, the structure of the ticket was unfair to Ski Co. Highlands' payment of Ski Co.'s daily lift ticket price and the sales commission did not compensate Ski Co. for the loss of the opportunity to compete for the three days of patronage Highlands allocated to itself. The ticket was

structured not with concern for fairness to Ski Co. or skiers, but only to protect Highlands' profits. J.A. 41. Some skiers may be indifferent to whether they spend an extra day or two at Highlands or Ski Co. There is no reason why Highlands should be able to exploit such indifference by designing a ticket package unfairly advantageous to it and coercing Ski Co.'s participation. In the long run, the Adventure Pack would have to face the test of the market, but Highlands persisted with the scheme even in the face of general consumer rejection, perhaps because it could be sold to first-time visitors. Highlands would not under any circumstances of market demand reduce the number of days allocated to it because to do so would be unprofitable. J.A. 41.[33] Thus, Ski Co. would for some time be locked into a financially disadvantageous arrangement in which it had to compete against itself.

Second, Ski Co.'s lift tickets are fungible and have a publicly-announced price. In some industries, products or services are not fungible, and prices are subject to individual negotiation. If a firm making such a product has a duty to sell it to a competitor, then competitors must negotiate about price, and presumably costs and other factors that enter into price. Such negotiations could well serve as a cover for collusion.

Third, would a duty to sell to a competitor apply only to a firm with monopoly power, or to any firm? If the former, then smaller firms would, by force of law, be able to offer joint products but larger firms would not. If the market paid a premium for the joint product, it would be captured by the smaller firms. That would be an unfair and an incentive- and efficiency-eroding disadvantage to impose

[33] In this respect, Highlands differs from an independent tour packager, who presumably is neutral as between the skiing firms. The independent packager is likely to be more responsive to market demand than Highlands and would, as appropriate, reduce Highlands' number of days to two, one or zero.

on a firm that, although enjoying monopoly power, had done nothing wrong. If all firms have a duty to sell to competitors, then a large firm could make demands on a small firm; and the courts would have to work out, case by case, what limitations, if any, to impose on the duty, so as to protect small firms. If the small firm's duty to sell to the large arises only if it invokes the large firm's duty to sell to it, then competition would take on features of a game: business strategies would address not only how to make and sell the largest quantity of the best product at the lowest cost, but also when and how to take advantage of a rival's products by asserting a right to purchase and resell them, subject to the rival's reciprocal right.

Fourth, a firm armed with an enforceable right to buy and re-sell the products of a horizontal rival might use that right, advertently or inadvertently, to injure the rival's good will. Such injury might result from, *e.g.*, inadequate point-of-sale explanation to purchasers, warranties, service, or refund policies. This concern might be partially removed by recognition of a defense of legitimate business justification (beyond desire to compete). Then, however, the risk of failure to persuade the jury would rest with the firm that internalized the guiding principle of the Sherman Act and simply wanted to compete on the merits. That healthy desire should not be so burdened. Those defeated by a larger firm competing vigorously on the merits may well elicit sympathy from juries, who may not accept that protection of inefficient firms ultimately harms consumers.

3. Ski Co.'s Offering of its Own Six-Day Ticket Was Not Exclusionary.

Neither of the courts below found Ski Co's six-day ticket unlawful. It was a response to market demand, *see* p. 24, *supra*. It did not restrain Highlands' ability to offer its own

tickets to skiers. Because Ski Co. offered one-day tickets (and also, for most of the time, three-day tickets), its six-day ticket was not a tying arrangement and did not restrain the freedom of skiers to choose between Highlands and Ski Co. It was not predatory, and its success did not depend on monopoly power. It was not exclusionary.

• • •

Therefore, Ski Co.'s conduct was not exclusionary and does not support a verdict of monopolization.

II. THE ESSENTIAL FACILITIES DOCTRINE DOES NOT APPLY TO THIS CASE

The origins of the doctrine lie in *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912), and *Gamco, Inc.* v. *Providence Fruit & Produce Building, Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).[34] Each case involved a combination of horizontal competitors violating §1. In each, the combination had integrated backward to gain control over a service used by its members in the market in which they competed with each other. The service controlled was a *producer*, not a *consumer*, service: it would be used or transformed by each firm in carrying on its own competitive business in the downstream market. The service was essential for participation in that market.

---

[34] *See also* Montague & Co. v. Lowry, 193 U.S. 38 (1904); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 47-49 (1912). Associated Press v. United States, 326 U.S. 1 (1945), is sometimes considered an essential facilities case, but really is not. The Court treated the case as involving a concerted horizontal refusal to deal, and decided it on that basis. *See, e.g.*, 326 U.S. at 4, 9 n.4, 12, 15, 18-19. It did not cite *Terminal Railroad.* The decree did not require the AP to admit non-member newspapers (the appropriate remedy in a true essential facilities situation), but rather required it merely to avoid discrimination against competitors of existing members when considering applications for membership. *Id. See also* n.39, *infra.*

The first subsequent case to present a unilateral denial of access to an essential facility was *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973). *See also Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927). There, as in *Terminal Railroad* and *Gamco*, the defendant was vertically integrated, the integration gave it control of a producer good or service (bulk electric power), and that good or service was essential to participate in the downstream market (retail sales of power). There was no §1 combination, but the defendant was a regulated utility. The fact of regulation warranted an inference that, at the wholesale level, Otter Tail enjoyed a natural monopoly, and that consequently for all or most of its potential wholesale customers (municipal utilities selling at retail) bulk power truly was unobtainable elsewhere. Although Otter Tail was not regulated in all facets of its business, to the extent it was regulated as a public utility it was outside the framework of free market competition, and therefore a more suitable object than an unregulated firm for imposition of an affirmative duty to deal.[35] The already applicable regulatory process provided a convenient non-judicial mechanism for implementing a duty to deal, or at least a model a court could follow. *See* 410 U.S. at 375. This Court did not invoke the essential facilities doctrine, but, viewing the case as one of inter-market leveraging, cited *Griffith*. 410 U.S. at 377.[36]

---

[35] Thus, in United States v. Colgate & Co., 250 U.S. 300, 307 (1919), the Court's formulation of the right of a trader to choose the parties it will deal with limited that right to one "engaged in an entirely private business," *i.e.*, a firm other than a public utility, common carrier, inn or similar business. The "*Colgate* doctrine" is discussed at pp. 42, 48-50, *infra*.

[36] Otter Tail had two kinds of monopoly: one in the wholesale transmission market for its service area, and the other in individual towns in which it sold at retail. It is not clear whether the Court, in its analysis of leveraging, relied on a theory of horizontal leveraging based

Footnote continued on next page

Since *Otter Tail*, the doctrine has been considered in numerous lower court decisions,[37] and its elements are relatively clear:

First, it is directed at a familiar evil: the use of monopoly power in one market to exclude or distort competition in another (here, vertically adjacent) market.[38] *Cf., e.g., Griffith, supra; Lorain Journal, supra*; unlawful tying arrangements, *e.g., Jefferson County Hospital District* v. *Hyde*, 104 S. Ct. 1551 (1984). It does not matter how the monopoly was obtained, or whether the monopolist is regulated. The doctrine prohibits unilateral vertical inter-market leveraging even by a lawful monopolist.

Second, the doctrine has been applied where the defendant competed in one market and (through growth, acquisition or contract) controlled a vertically adjacent market that provided an input for the downstream market. Thus, for example, in *Hecht* v. *Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), the defendant was an actual, and the plaintiff a potential, competitor in the market for professional football exhibitions; but also, the defendant, through contract, had gained control over the relevant geographic market's only suitable stadium, an essential input.

Footnote 36 continued

on the power in individual towns (as was the case in *Griffith*), or on a theory of vertical leveraging based on monopoly power at the wholesale level (on analogy to *Terminal Railroad* and *Gamco*). Only a theory of vertical leveraging would seem to fit the facts.

[37] Many of the cases are reviewed in Note, *Unclogging the Bottleneck: A New Essential Facility Doctrine*, 83 Colum. L. Rev. 441 (1983); Note, *Refusals to Deal by Vertically Integrated Monopolists*, 87 Harv. L. Rev. 1720 (1974).

[38] *See, e.g.*, MCI Communications Corp. v. AT&T, 708 F.2d at 1132; Mid-Texas Communications Systems Inc. v. AT&T, 615 F.2d 1372, 1387 (5th Cir. 1980); Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091, 1097-98 n.9 (D. Md. 1979).

Third, in every case applying the doctrine, the plaintiff wanted to purchase from the integrated defendant an input (producer or wholesale good or service) with which the plaintiff's own product did not complete. None involved a *consumer* good or service that the plaintiff's product competed with and that the plaintiff wanted to buy at retail and re-sell to the public.

Fourth, the facility in question must be truly essential, in that, as a practical matter, it is necessary for entry into or survival in a market, and no substitute is available or can be created. "[A] facility is not essential merely because it is better than, or preferable to, another." *Fishman* v. *Wirtz*, 1981-82 Trade Cas. (CCH) ¶ 64,378 at 74,771 (N.D. Ill. 1981). It is not enough that a facility is "more economical" or "more beneficial." *Florida Cities* v. *Florida Power & Light Co.*, 525 F. Supp. 1000, 1007 (S.D. Fla. 1981).

The distinction between merely "advantageous" and truly "essential" is nicely illustrated in *MCI Communications Corp.* v. *AT&T*, n.16, *supra*. MCI, which was in the long distance telephone service business, demanded access to (i) AT&T's local telephone service, and (ii) AT&T's long distance network, which was much larger than MCI's. The court held that AT&T had a duty to provide the local service because it was "essential" for MCI to offer its long distance service, 708 F.2d at 1132-33. Although access to AT&T's national long distance network would have been of great benefit to MCI, the court held that AT&T had no duty to provide it because in that market MCI and AT&T were competitors and AT&T's network had not been shown to be "essential". 708 F.2d at 1148. *Accord, American Football League* v. *National Football League*, 323 F.2d 124, 131 (4th Cir. 1963).

This requirement of essentiality is particularly important where the facility in question is controlled by a single firm rather than a combination. A combination may create an unreasonable restraint of trade through control of a

facility that is not essential.[39] The plaintiff's remedy in such a case need not be an order for access, but merely an injunction requiring the defendants to act independently, or prohibiting discrimination by the combination against non-members. Where a single defendant is involved, however, such remedies are unlikely to be useful, and the only remedy may be an affirmative duty to deal.

Imposition of a duty to deal with a competitor is a drastic departure from established antitrust principles, which generally recognize the freedom of firms to decide with whom they will deal, *see* pp. 48-50, *infra*, and which are suspicious of, and certainly do not encourage, dealings between horizontal competitors. Where a firm is not assured through regulation of a prescribed rate of return, imposition of such a duty would erode incentives to take risks, make investments, and compete vigorously. *Cf. MCI* v. *AT&T*, 708 F.2d at 1148-49; *Florida Cities* v. *Florida Power & Light Co.*, 525 F. Supp. at 1007. A duty to deal should not be imposed except where the facilities involved are truly essential, and the duty is necessary to prevent vertical leveraging.

The instant case does not satisfy *any* of the criteria for application of the essential facilities doctrine. First, there was no leveraging of monopoly power in one market to exclude or distort competition in another. Second, Ski Co. was not vertically integrated; it had no actual or potential vertical relationship to Highlands; it produced no goods or services needed by Highlands to offer its own services to the market. Third, Highlands did not seek to buy from Ski Co. any *producer* or wholesale service or good for use in the production or delivery of its own services, and what it sought from Ski Co. was a service (or ticket) with which its

---

[39] In *Associated Press v. United States*, n.34, *supra*, the holding did not depend on any finding that the AP news service was essential. For a *combination* to restrain trade unlawfully, it is enough that it discriminatorily withhold a competitive advantage. 326 U.S. at 17.

own service (or ticket) competed. Highlands sought to buy its horizontal competitor's *consumer* service, which it wanted to re-sell to the public in a manner that would induce tag-along purchases of its own skiing services.

Fourth, Ski Co. had no essential facility. Highlands certainly was able to offer its own skiing services to the market in any unilateral form it chose. If Ski Co. had suddenly vanished, Highlands would not have been undone by lack of an essential facility, but would have enjoyed a monopoly in the Aspen market. Ski Co. may have had better facilities (a claim Highlands denies), but "better" is not "essential". The record contains convincing and undisputed evidence of non-essentiality.[40] It is a public fact, moreover, that a number of successful destination skiing areas have only one skiing mountain—*e.g.*, Sun Valley, Steamboat, and Crested Butte. Plainly, multi-mountain capacity is not *essential* to success.

The court below supported its application of the essential facilities doctrine on two grounds. First, "[i]f [Ski Co.]

[40] Ski Co.'s Snowmass attracts 95% destination skiers, and of the skiers who use Snowmass 83% ski nowhere else. J.A. 152. Since destination skiers are the ones who ski for a week at a time, J.A. 90, 129, it follows that the vast majority of those who ski at Snowmass spend all six days of their trip there.

When, after ten years, the joint ticket was eliminated for the 1972-73 season, Highlands did not claim it was being denied an essential facility, and it did not sue. J.A. 155. Nor does the record suggest that Highlands attracted fewer skiers that season than it did when the joint ticket was offered.

At the time of trial, another firm, independent of both Highlands and Ski Co., was preparing to open a one-mountain skiing operation in the Aspen area ("Little Annie") to compete without a joint ticket against both firms. J.A. 145-47, 174-76. After trial the Little Annie project failed, for reasons not shown by the record. It is clear, however, that the perception of the market was that multi-mountain capacity is not essential for success.

refuses to market a multi-day multi-mountain ticket with [Highlands], [Highlands] cannot compete in the market for such tickets." Pet. App. 20a-21a. There is no evidence of, Highlands did not propose, and the jury did not find, any such market. See p. 5, *supra*. Highlands was able to offer its services in each market the jury did find.

Second, the court noted the "difficulty" of developing another skiing mountain in the Aspen area due to regulatory restrictions, delays, and the expense and time needed for development. Pet. App. 21a. But there was, and could be, no finding that multi-mountain capacity is needed for success. See p. 38, *supra*. Even if multi-mountain capacity were needed, the court did not, and could not, find that it was impractical to develop another mountain nearby. It did not find that there were no other mountains suitable for development, or that upon a showing of need the Forest Service would not approve further development. It also did not consider that, when trial started, Highlands had been in business for approximately 23 years, more than enough time to develop additional mountains, if they were really essential. Like Ski Co., Highlands had the opportunity to develop multi-mountain capacity; unlike Ski Co., it sat by complacently. The situation of Highlands is the same as that of any firm that over many years has failed to take the long-lead-time steps needed to remain competitive in a changing market and then finds itself unable in the short term to attract as much patronage as a rival. This type of situation exists wherever one firm has gained an advantage over its rivals by investing in a more efficient factory, or in research and development, or a large network of local branches. It is the situation presented by IBM's development of its 370 generation of computers, by Home Box Office's pioneering use of a communications satellite for delivering movies to homes, and by General Motors' new Saturn project to revolutionize domestic manufacture of motor vehicles. Such undertakings require vision, planning,

a willingness to take risks, and long lead-times. Under the Sherman Act, a faltering firm should have no right to tap into the superior current resources of its horizontal rival in order to protect itself from mistaken past inactivity.

III. THE DECISION BELOW CANNOT BE UPHELD ON THE THEORY THAT SKI CO.'S CONDUCT MANIFESTED AN ANTI-COMPETITIVE INTENT

A. "Anti-Competitive Intent" Does Not Transform Independent Non-Exclusionary Conduct Into Monopolization

The confusion created by prior definitions of "monopolization" is reflected in the decision below. In a civil case the only intent relevant to monopolization is the general intent to commit the acts that (together with monopoly power) constitute the offense. *United States* v. *Griffith*, 334 U.S. at 105; *Alcoa*, 148 F.2d at 432. Such intent may be inferred from the acts themselves. Beyond that, intent is irrelevant.[41]

[41] "To compete is to strive for something which another is actively seeking and wishes to gain." United States v. Union Pacific R.R., 226 U.S. 61, 87 (1912). "[A]n efficient firm may capture unsatisfied customers from an inefficient rival. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster." Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. at 2740. Because the purpose of the antitrust laws is to protect the competitive process and not individual competitors, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488, an intent to prevail in competition on the merits, even to the point of capturing all the customers of an inefficient rival is not unlawful, even if the resulting conduct is fatal to the rival. United States v. United States Steel Corp. 251 U.S. at 450; R. Bork, THE ANTITRUST PARADOX 118-19 (1978). An intent to prevail through non-exclusionary conduct is the motive force for productive efficiency and the creation of wealth for consumers. An intent to prevail through exclusionary conduct is irrelevant unless exclusionary conduct is engaged in; and, in that case, illegality should be based on the conduct, not the intent.

In a treble damage action, if a defendant with monopoly power engaged in substantial exclusionary conduct that caused injury to the plaintiff's business or property, the defendant is liable. It is no defense that its "intentions" were benevolent. If the defendant's conduct was not exclusionary, it *cannot* give rise to an inference of improper intent, and extrinsic evidence of such intent should not create liability.[42] Where there is ambiguity or doubt whether the conduct was exclusionary, extrinsic evidence of intent may shed light on its probable effects. *E.g.*, *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231, 238 (1918). In sum, anti-competitive intent has no role in monopolization, except as an aid in the analysis of conduct and its effects.

Where specific intent or another mental element is required under §2 (in attempt, *see* n. 12, *supra*, and in criminal cases, *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 (1978)), it is not a substitute for exclusionary conduct, but is required *in addition to* such conduct. The court below erred in holding, in effect, that otherwise lawful competitive conduct becomes monopolization if carried out with an anti-competitive intent.

The court cited five cases as supporting its reliance on intent: *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, *supra*; *Lorain Journal*, *supra*; *Byars* v. *Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1979); and *MCI*, *supra*. None is on point. The rule of law for which each stands can be stated without reference to intent.

[42] Of course, an otherwise lawful practice may become unlawful if it is part of a contract, combination, or conspiracy in restraint of trade. Associated Press v. United States, 326 U.S. at 14, and extrinsic evidence of subjective intent may be relevant to show whether a contract, combination, or conspiracy existed.

In *Colgate*, a criminal § 1 case, the Court stated:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal.

250 U.S. at 307. This reference to improper "purpose" is not self-explanatory. In the period when *Colgate* was decided (and subsequently), this Court and others did not seek or commonly rely on extrinsic evidence of subjective purpose (or intent or motive). They inferred purpose from conduct and economic circumstances. *See* n. 11, *supra*. A reference to improper purpose is, thus, a shorthand reference to improper conduct, from which an inference of improper purpose would arise. *Colgate*'s reference to "the absence of any purpose to create or maintain a monopoly" should be understood as a reference to the absence not of a particular state of mind, but of additional conduct or circumstances that make the refusal to deal exclusionary.

This interpretation is fortified by the subsequent history of the "*Colgate* doctrine". It addresses a manufacturer's interactions with distributors or retailers. Its subsequent refinements relate to the scope of permissible manufacturer *conduct* to achieve compliance with its wishes, particularly as to resale prices.[43] The cases treat the *Colgate* doctrine as focusing on conduct, not intent.

Kodak referred to anti-competitive intent, 273 U.S. at 359, but the Court merely inferred it from conduct and

[43] *See, e.g.*, FTC v. Beech-Nut Packing Co., 257 U.S. 441, 451-55 (1922); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721-23 (1944); United States v. Parke, Davis & Co., 362 U.S. 29, 38-47 (1960); Simpson v. Union Oil Co., 377 U.S. 13 (1964); Albrecht v. Herald Co., 390 U.S. 145 (1968). *See also* Associated Press v. United States, 326 U.S. 1, 14-15 (1945).

circumstances, *id.* at 375. We would analyze the facts today under the essential facilities doctrine,[44] and would base liability on exclusionary conduct without regard to intent. Intent had no independent role in the case.

Lorain Journal was a case of attempt, not monopolization. and, therefore, specific intent was required. As usual, it was not established by extrinsic evidence, but was inferred from clearly exclusionary conduct and circumstances. *See* pp. 29-30, *supra*.

Byars concluded: "However one characterizes the approaches used, we think it clear that what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices," 609 F.2d at 860. *See also Home Placement Service* v. *Providence Journal Co.*, 682 F.2d 274, 281 (1st Cir. 1982).

Finally, *MCI* squarely rejected a test based on intent. 708 F.2d at 1113, quoted at Pet. 20. *See also* 708 F.2d at 1148-49 (focus on intent *and competitive effect*).

There are good reasons for not enlarging the area where specific anti-competitive intent is relevant. It is extremely difficult, often impossible, to distinguish between a strong desire to prevail in competition on the merits and an intent to prevail by excluding competition. An expressed desire to drive opponents out of business may reflect merely an intent to compete effectively on the merits.[45] Anti-competitive expressions by some members of a collegial body may

[44] Kodak was a vertically integrated manufacturer-stock house, with which Southern competed in the stock house market in the South. 273 U.S. at 368. Kodak had a monopoly at the manufacturing level. 273 U.S. at 369. Its refusal to sell photographic materials to Southern at the wholesale price was, therefore, a denial of an essential facility.

[45] *See, e.g.*, Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971); American Football League v. National Football League, 323 F.2d 124, 134 (4th Cir. 1963); Scott Publishing Co. v. Columbia Basin Publishers, Inc., 293 F.2d 15, 21-22 (9th Cir.), *cert. denied*, 368 U.S. 940 (1961).

not fairly reflect the body's collective intent. *E.g.*, *American Football League* v. *National Football League*, 323 F.2d at 132. By distracting lower courts and juries from a clear focus on the competitive effects of conduct (which often are difficult to analyze), the search for intent may lead, as here, to erroneous results.

These difficulties are tolerable in attempt cases, where, because monopolization has not been achieved, reference to specific intent is necessary to define uncompleted conduct; and in criminal cases, for the reasons stated in *Gypsum*. But no such necessity obtains in a civil monopolization case. There, the heart of the matter is effect on the process of competition, *i.e.*, whether the conduct at issue is exclusionary. The term "intent," as actually used in such cases, really does not refer to a state of "mind" of the corporate defendant; it does refer to the economic nature and effects of its conduct in the circumstances. *See* 3 Areeda & Turner ¶ 626a at 77.

Therefore, there is no theory of monopolization through unlawful intent, under which Ski Co.'s conduct can be condemned.

B. There Is No Substantial Evidence That Ski Co. Had An Anti-Competitive Intent

Even if anti-competitive intent is an independent element of monopolization, there was still no jury issue because there was no substantial evidence of anti-competitive intent. The principal extrinsic evidence of Ski Co.'s subjective intent was statements by members of its management. Highlands' marketing director testified that he was told by Ski Co.'s finance director, Peter Sullivan: "[W]e will not support our competition." J.A. 146. Called as a witness by Highlands, Mr. Sullivan testified that Ski Co. thought it could do better without a joint ticket, J.A. 78-79. Also, Director Art Pfister testified: "I have never really been in favor of the four-area ticket. I am a businessman,

and I have never understood why a businessman should help his competitor. I don't want to kill him, but I don't want to help him." J.A. 141; *see also* Tr. 925, 927, 929. These statements evidence an intent that is competitive, not anti-competitive.

The court below, however, did not consider this evidence. Nor did it draw an inference of anti-competitive intent from the fact that Ski Co. refused to participate in the joint ticket. It apparently recognized that no such inference can be drawn from the mere fact that a firm pursues a strategy of competition rather than horizontal cooperation. Instead, the court inferred anti-competitive intent from three other aspects of Ski Co.'s conduct and the attendant circumstances. No such inference, however, can properly be drawn.

First, the court relied on "evidence that [Ski Co.] refused to offer a four mountain ticket, despite skiers' frustration over its unavailability." Pet. App. 22a-23a. Evidence of some consumers' subjective "frustration" is irrelevant. It does not indicate predation: a predatory strategy is to make consumers happy in the short run (through prices below cost) so as to draw them away from a competitor. No predatory strategy succeeds by "frustrating" consumers. Nor does "frustration" indicate that conduct is exclusionary. Firms commonly "frustrate" some consumers by terminating some product in the hope of satisfying a larger demand and earning larger revenues in other ways (*e.g.*, cancellation of television program, re-location of sports franchise). Nor does "frustration" indicate coercion. Skiers simply were not coerced. *See* pp. 20-21, *supra*.[46]

---

[46] The evidence of "frustration" cited by the court, Tr. 1808-16, was the answer to two questions propounded in a 1979-80 survey of skier attitudes. There was no evidence that any skier patronized a Ski Co. mountain when he or she would have preferred to patronize Highlands. Skiers were free to ski where they wanted as much as they wanted. *See* pp. 20-21, *supra*. It is fair to conclude that those who chose to patronize Ski Co. but wistfully thought about Highlands were not so seriously "frustrated" as to do something about it.

More generally, short-run consumer "frustration" has no relevance to any antitrust issue. The benefits of competition are not always obvious to consumers in the short run, and what they tell pollsters is not a reliable guide to long-term competitive effects or to sound antitrust policy. Therefore, the "frustration" of some consumers does not support an inference of anti-competitive intent.

Second, the court relied on the fact that Ski Co. refused to accept Highlands' bank-guaranteed Adventure Pack coupons. Pet. App. 23a. This conduct was merely part of Ski Co.'s policy of not cooperating with Highlands, and was not exclusionary. See pp. 28-32, *supra*. Therefore, no inference of anti-competitive intent arises.

Third, the court relied on the fact that, for the 1981-82 season (*after* the damage period), Ski Co. "raised the price of its single-day ticket to $22.00, thereby making it unprofitable for [Highlands] to market its Adventure Pack." Pet. App. 23a. The usual complaint of a competitor about a monopolist's prices is that they are too low, not that they are too high. *See, e.g., Northeastern Telephone Co.* v. *AT&T*, 651 F.2d at 86. If firms are competing, one firm's high prices tend to drive customers *away from* it and *toward* its rivals. High prices also tend to attract new entrants. Thus, in many circumstances as prices rise the competitive system, if allowed to work, tends to erode monopoly profits and power. *Standard Oil Co.* v. *United States*, 221 U.S. at 62. If Ski Co.'s price is artificially held down to protect Highlands' Adventure Pack, it will be more difficult for any new entrant to succeed. This anti-competitive effect, not noticed by the court, indicates the dangers of judicial tampering with the free market.[47]

[47] Similarly, if a new entrant, too, decides that it prefers cooperation to competition and demands that Ski Co. enter into a joint ticket with it, under the decision below Ski Co. would have a duty to comply. If the

Footnote continued on next page

Moreover, the implication of the court's analysis is that Ski Co. had a duty to keep its prices low so that Highlands' chosen marketing scheme, the Adventure Pack, would succeed. Ski Co. apparently would have to consult Highlands about Highlands' economic needs in order to know how high it could price its own tickets under the antitrust laws. The implied restraint on Ski Co.'s freedom to price *its own tickets* is contrary to the rationale for holding price-fixing unlawful—public benefit from freedom of individual economic units to set prices independently. *E.g., Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 346. It is also contrary to the spirit, and probably the letter, of the 1977 consent decree, which requires each firm to set its own ticket prices without communication with the other (Ex. 26, Tr. 180; Tr. 405).

Anti-competitive intent may be inferred from the price increase only if the latter was exclusionary. Because it was not, the inference does not arise.

For these reasons, no inference of anti-competitive intent can be drawn from any of the aspects of Ski Co.'s conduct or the surrounding circumstances.

Footnote 47 continued

joint ticket with the new entrant were priced lower than the joint ticket with Highlands and drew patronage away from Highlands, would Highlands have another treble damage claim, on the theory that Ski Co.'s cooperation was illusory or discriminatory? Would the new entrants have a right to demand inclusion in the Ski Co.-Highlands joint ticket, or only inclusion in a joint ticket with Ski Co.? If Ski Co. were to enter into cooperative arrangements with both firms in order to comply with §2, would it have to consider the economic needs of *both* when setting *its own* prices? Would failure to do so evidence anti-competitive intent? How much of its capacity would Ski Co. have to dedicate to such involuntary cooperative arrangements? If the new entrant adheres to a go-it-alone philosophy, could it challenge the Ski Co.-Highlands joint ticket as exclusionary toward it? These represent some of the practical questions that the decision below may well lead to, if not reversed.

IV. AN INDEPENDENT REFUSAL BY AN UNINTEGRATED FIRM TO PARTICIPATE IN A COOPERATIVE MARKETING ARRANGEMENT WITH A HORIZONTAL COMPETITOR SHOULD BE PER SE LAWFUL

> [T]here is [a] basic distinction between concerted and independent action . . . Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919); *cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

Monsanto Co. v. *Spray-Rite Service Corp.*, 104 S. Ct. 1464, 1469 (1984).[48] This principle of freedom in choosing those with whom one deals has deep roots in our political and social traditions. It also has powerful economic underpinnings. "Effective competition requires that traders have large freedom of action when conducting their own affairs." *FTC* v. *Curtis Publishing Co.*, 260 U.S. 568, 582 (1923); *see also FTC* v. *Sinclair Mfg. Co.*, 261 U.S. 463, 476 (1923); cases cited in n.17, *supra*. The decisive advantage of a competitive system over any managed economy is the freedom and powerful incentive it gives to every economic unit to use all its resources to identify and exploit opportunities to provide the largest and best output of goods and services at the lowest cost. Maintenance of that system of freedom and incentives is the function of antitrust laws. The Sherman Act's commitment to the advancement of consumer welfare through decision-making by individual economic units in competition with one another precludes imposition, on the supposed authority of the Act, of a duty of horizontal joint marketing.

---

[48] *See also* Reeves, Inc. v. Stake, 447 U.S. 429, 438-39 (1980); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d at 286 ("any firm, even a monopolist, may generally bring its products to market whenever and however it chooses").

There are, of course, certain well-recognized limitations to the general principle that a firm is free to decide with whom it will deal or not deal. A *concerted* refusal to deal is generally unlawful *per se*. *E.g.*, *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). Outside the context of exclusive dealerships, which may be justified by efficiencies, *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), a firm with monopoly power may not sell only to customers who do not patronize its competitors, *Lorain Journal*, *supra*. A firm may not combine a refusal to deal with other efforts affirmatively to enforce resale prices, cases cited in n.43, *supra*. The essential facilities doctrine is a fourth limitation.

None of these limitations addresses a unilateral horizontal refusal to cooperate. The first three impose no duty to deal, but merely prohibit certain kinds of conduct. Only the essential facilities doctrine imposes an affirmative duty, and it does so only in a limited area. An unintegrated monopolist's independent refusal to enter into a cooperative marketing arrangement with a horizontal competitor is squarely within the *Monsanto-Colgate* principle.

Highlands' demand for a joint marketing arrangement is analogous to the restriction on the televising of college football games in *NCAA* v. *Board of Regents*, *supra*. There, as here, the party seeking to impose the arrangement feared that in a free competitive environment it (actually, its members) would not sell as many tickets. This Court upheld the interest in competition, 104 S. Ct. at 2969.

The alternative to the *Monsanto-Colgate* principle is judicial supervision of dealings. The courts have always been extremely reluctant to "set sail on [that] sea of doubt." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 283-84 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (Taft, J., referring to judicial supervision of cartels). *See also United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-32 (1897). An affirmance in this case would launch

the federal courts on that sea with no sextant other than, perhaps, something like "fair competition," a term without definite meaning or standards, *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935).

CONCLUSION

For the foregoing reasons, this Court should hold that Ski Co.'s refusal to participate in the joint ticket and the attendant conduct and circumstances did not present a jury issue of exclusionary conduct or, therefore, of monopolization; and that, consequently, a directed verdict on that issue should have been entered for Ski Co. Accordingly, the Court should reverse the judgment below.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
MARK S. LEVINSTEIN
MANLEY W. ROBERTS
WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Attorneys for Petitioner

Of Counsel
DAVID G. PALMER
WILLIAM W. MAYWHORT
Denver, Colorado

Dated: January 24, 1985

MOTION FILED
JAN 24 1985

No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,
Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

MOTION OF AMERICAN AIRLINES, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER AND BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBERT E. COOPER
GIBSON, DUNN and CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

*THEODORE B. OLSON
GIBSON, DUNN and CRUTCHER
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 955-8500

Attorneys for Amicus Curiae

Of Counsel:

STEVE MCCRACKEN
GIBSON, DUNN and CRUTCHER

January 24, 1985

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

American Airlines, Inc. (hereafter "American") respectfully moves for leave to file the attached brief as *amicus curiae* in this case. Petitioner's attorneys have consented to the filing of this brief. The consent of the attorneys for the respondent was requested but refused.

American is currently a defendant in an antitrust action. One of the issues in that litigation is the application of the antitrust "essential facilities" doctrine. While American firmly believes that the doctrine has no application to its case, its opponents urge the reverse. Since the Court's decision in the instant case may have a significant impact on the law concerning the "essential facilities" doctrine, it may, therefore, have a material impact on the outcome of the litigation in which American is a party.

American seeks to raise an issue not yet clearly developed by either party to these proceedings. To date, the litigants have concerned themselves most directly with the legal questions surrounding the issue of a refusal to deal. Yet, in the instant case the Court of Appeals for the Tenth Circuit also addressed the issue of the liability of a party which has not refused to deal. Specifically, the question is whether under the "essential facilities" doctrine, the courts may not only require a party to deal with a competitor, but may also establish the terms on which that relationship must be predicated. This is an important and largely uncharted legal issue. If American's concerns are not allowed to be expressed in this proceeding, fundamental questions of law which may materially affect

it might be decided without a proper ventilation of the issues.

For these reasons, American requests leave to file this brief as *amicus curiae* on behalf of petitioner.

Respectfully submitted,

ROBERT E. COOPER
THEODORE B. OLSON
GIBSON, DUNN and CRUTCHER
Attorneys for Amicus Curiae

Of Counsel:

STEVE MCCRACKEN
GIBSON, DUNN and CRUTCHER

January 24, 1985

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION AND STATEMENT OF INTEREST 1

ARGUMENT 3

I. The Case Involves Issues Beyond A Simple Refusal To Deal By The Owner Of An "Essential Facility" 3

II. This Court Has Never Specified The Terms On Which An Individual Owner Of An "Essential Facility" Must Deal With Its Competitors 5

III. In The Absence Of A Refusal To Deal, The Individual Owner Of An "Essential Facility" Is Entitled To The Competitive Advantages Created By Its Development Of Such A Facility 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES: Page

Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509 (10th Cir. 1984) 1, 4

Associated Press v. United States, 326 U.S. 1 (1945) .. 5

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (3d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980) 7, 8

Buffalo-Courier Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48 (2d Cir. 1979) 8

Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979) 9

California Computer Products, Inc. v. International Business Machines Corp., 613 F.2d 727 (9th Cir. 1979) 8

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978) 6

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 5

Sausalito Pharmacy, Inc. v. Blue Shield, 544 F. Supp. 230, 235 (N.D. Cal. 1981), *aff'd per curiam,* 677 F.2d 47 (9th Cir.), *cert. denied,* 459 U.S. 1016 (1982) 8

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) 7

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 7

United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944) 9

United States v. Paramount Pictures, Inc., 344 U.S. 131 (1948) 9

TABLE OF AUTHORITIES continued

Page

United States v. Terminal Railroad Association, 224 U.S. 383 (1912) 5

MISCELLANEOUS:

21 Cong. Rec. No. 3146-52 (1890) 8

Kaysen & Turner, *Antitrust Policy* (1959) 8

General Motors Corp. (Crash Parts), 3 Trade Reg. Rep. (CCH) ¶ 21, 931 (FTC 1982) 9

3 P. Areeda & D. Turner, *Antitrust Law* (1978) 9

R. Posner, *Antitrust Law: An Economic Perspective* (1976) 9

BRIEF OF AMERICAN AIRLINES, INC. AS AMICUS CURIAE

INTRODUCTION AND STATEMENT OF INTEREST

This case involves a claim in which a firm has demanded access to the facilities of its competitor, and has insisted that those facilities be made available on terms satisfactory to it. American Airlines, Inc. ("American") is presently involved as a litigant in various proceedings in which some of its competitors are making similar demands.

While the parties have treated this case as involving a classic refusal to deal,[1] for at least one of the years for which damages were awarded, the record shows unequivocally that there was no such refusal. With respect to that year (the 1977-78 skiing season), the United States Court of Appeals for the Tenth Circuit reached the following conclusion:

> We conclude that there was sufficient evidence for the jury to conclude that plaintiff was injured through the exercise of monopoly power by defendant's acts in compelling plaintiff to accept 15% as its share of the profits from the joint four-area ticket during the 1977-78 season, rather than dividing revenues on the basis of actual use.

Aspen Highlands Skiing Corp. v. *Aspen Skiing Co.*, 738 F.2d 1509, 1525 (10th Cir. 1984).

---

[1] American strongly agrees with the petitioner that the lower court committed error in finding that petitioner possessed an "essential facility" and had a legal duty to deal with its competitor. Because that issue will be addressed by petitioner, American does treat it here.

This conclusion suggests that a company not only must grant its competitors access to facilities which it has developed at great expense and great risk, but that it must do so on terms satisfactory to the competitors. Thus construed, the decision below essentially strips a company of the competitive advantages which it has obtained as a result of its own lawful innovation and development, and imposes court-administered utility-type price regulation on its business conduct. Moreover, it would allow a company drastically to change the balance of bargaining power in a private negotiation by using the antitrust laws and the federal courts to renegotiate a contract.

The Tenth Circuit was in error in reaching this conclusion. The antitrust laws have never been interpreted in a manner which requires socializing among all competitors the advantages which a business has obtained as a result of its own lawful innovation and initiative. While some constructions of the antitrust laws may be said to require the deevloper-owner of an "essential facility" to provide its competitors with access to that facility, the antitrust laws have not been construed to impose utility-type regulations on the prices which a business may charge for such access. To the contrary, the antitrust laws and the free enterprise system allow the developer-owner of an innovative and commercially valuable product to charge prices as determined by the marketplace, and to enjoy the rewards which accompany successful investment of risk capital.

In the cases decided by this Court which have addressed the "essential facilities" doctrine, this Court has never gone so far as to suggest that the courts

can or should determine the specific terms on which an individual owner of an "essential facility" must deal with its competitors. We are not aware of any previous occasion on which this important issue has come before the Court.

A proper resolution of this issue would balance the policies and goals of the antitrust laws with the need to preserve market incentives and vigorous competition in the free enterprise system. The balancing of those interests would reject a rule of law which grants competitors access to an "essential facility" developed by another participant in the marketplace on terms which deny the owner the inherent right to enjoy the rewards which naturally flow from its skill, innovation and business acumen.

ARGUMENT

I

This Case Involves Issues Beyond A Simple Refusal To Deal By The Owner Of An "Essential Facility"

Petitioner Aspen Skiing Company ("Aspen Skiing") was the operator of three ski areas in Aspen, Colorado. Respondent Aspen Highlands Skiing Corporation ("Aspen Highlands") was the operator of a fourth ski area in Aspen. Aspen Skiing and Aspen Highlands jointly marketed lift tickets for some fourteen years pursuant to an agreement whereby revenues were divided on the basis of surveys of actual usage. Aspen Highlands' share of revenues ranged from 13.2 percent to 18.5 percent. Its share of revenues for the 1976-1977 ski season was 13.2 percent.

Aspen Skiing offered to continue the joint marketing program for the 1977-1978 ski season at a fixed 13.2 percent of revenues, rather than sharing based upon actual usage as demanded by Aspen Highlands. A compromise was reached whereby Aspen Highlands agreed to share at a fixed rate of 15 percent.

While some of the periods at issue in this case may have involved flat refusals to deal, *Id.* at 1521, the 1977-78 season clearly did not. Even if Aspen Skiing was driving a "hard bargain" during 1977-78, using its superior competitive position and bargaining power to its advantage to obtain a premium share of revenues in a joint marketing program, we are aware of no finding below that the offer extended by Aspen Skiing in 1977-78 and accepted by Aspen Highlands amounted to a refusal to deal or the economic equivalent of a refusal to deal. Nevertheless, the court found liability. As noted earlier, the Tenth Circuit held that liability could be predicated upon the

> . . . defendant's acts in compelling plaintiff to accept 15% as its share of the profits from the joint four-area ticket during the 1977-78 season, rather than dividing revenues on the basis of actual use.

Id. at 1525.

Thus, the liability of Aspen Skiing for the 1977-78 season appears to have been predicated on nothing more than bargaining in the marketplace to secure competitive advantages and rewards which were inherent in its superior competitive position.

II

This Court Has Never Specified The Terms On Which An Individual Owner Of An "Essential Facility" Must Deal With Its Competitors

Although this Court has never referred to the "essential facilities" doctrine, three decisions by this Court are generally cited as the intellectual underpinnings for such a doctrine: *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973); *Associated Press* v. *United States,* 326 U.S. 1 (1945); and *United States* v. *Terminal Railroad Association,* 224 U.S. 383 (1912). *Terminal Railroad* and *Associated Press* both dealt with concerted action by a group of competitors. For example, in *Terminal Railroad* the Court stated: "The fact that the terminal company is not an independent corporation at all is of the *utmost* significance." *Terminal Railroad,* 224 U.S. at 398 (emphasis added). In *Associated Press* the Court noted: "The heart of the government's charge was that appellants had *by concerted action* set up a system of By-Laws which prohibited all AP members from selling news to nonmembers, and which granted each member powers to block its non-member competitors from membership." *Associated Press,* 326 U.S. at 4 (emphasis added).

Only in *Otter Tail* did this Court arguably deal with the application of what has since become identified as the "essential facilities" doctrine in the context of conduct by a single firm acting with respect to its own property.

In *Otter Tail* the trial court had found that Otter Tail Power Co. had monopoly power in the retail sale of electric power, and had a "dominant" position in the market for subtransmission of electric power. The

trial court also found that Otter Tail had taken steps to assure the continued maintenance of its monopoly at the retail level. The steps included refusals to deal with municipal utilities, refusals to "wheel" power from other sources over its transmission lines to municipal utilities, and other conduct aimed at preventing municipalities from establishing their own electrical utlities at the retail level.

This Court affirmed in a narrow plurality opinion (four Justices concurred in the Court's opinion, three Justices dissented and two took no part in the decision). In doing so, this Court upheld a decree which enjoined Otter Tail from refusing to sell electric power at wholesale to existing or proposed municipal electric power systems in cities and towns located in its service area, and from refusing to wheel electric power over its transmission lines to such cities and towns. However, neither the trial court nor this Court purported to establish the terms on which Otter Tail must deal with local utilities. Because the prices, terms and conditions on which Otter Tail would deal with local utilities were subject to review and approval by the Federal Power Commission, this Court did not address the issue suggested by the Tenth Circuit ruling quoted above in the case now before the Court.[2]

---

[2] Certain lower courts have stated in *dicta* that access to an "essential facility" must be granted on "reasonable" terms. *See, e.g.*, Hecht v. Pro-Football, Inc., 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). However, because of the various ways in which these cases arose, no court has specifically addressed the issue.

III

In The Absence Of A Refusal To Deal, The Individual Owner Of An "Essential Facility" Is Entitled To The Competitive Advantages Created By Its Development Of Such A Facility

The antitrust laws do not prohibit the proper accumulation of market power itself, *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 62 (1911), and the owner of a lawfully-developed competitive advantage may normally determine prices in a manner consonant with the workings of the marketplace. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 274 n. 12, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). As was succinctly stated by Judge Learned Hand forty years ago: "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 430 (2d Cir. 1945). The antitrust laws allow a successful competitor to enjoy the benefits which flow to it naturally as a result of its own business acumen, such as the early development of a superior product:

> It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risk and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated. . . . Because, as we have already indicated, a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the

> merits, any success that it may achieve through "the process of invention and innovation" is clearly tolerated by the antitrust laws.

Berkey Photo, 603 F.2d at 281. *See also California Computer Products, Inc.* v. *International Business Machines Corp.,* 613 F.2d 727, 742 (9th Cir. 1979). The legislative history of the Sherman Act supports this view. The Sherman Act was deemed by its sponsors not to be applicable to one "who merely by superior skill and intelligence . . . got the whole business because nobody could do it as well." 21 Cong. Rec. 3146-52 (1890). *See also* Kaysen & Turner, *Antitrust Policy* 19-20 (1959).

The record in this case for the 1977-78 season suggests no more than that Aspen Highlands wanted Aspen Skiing to do business with it on the terms the former desired. But the antitrust laws protect competition, not competitors, and "[t]he failure to make *more* money . . . is simply not the kind of problem which the antitrust laws address." *Sausalito Pharmacy, Inc.* v. *Blue Shield,* 544 F. Supp. 230, 235 (N.D. Cal. 1981), *aff'd per curiam,* 677 F.2d 47 (9th Cir.), *cert. denied,* 459 U.S. 1016 (1982) (emphasis added). This Court should not leave standing a decision which effectively allows a party to use the antitrust laws "to insulate [itself] from the impact of competition." *Buffalo-Courier Express, Inc.* v. *Buffalo Evening News, Inc.,* 601 F.2d 48, 55 (2d Cir. 1979).

It would be unwise to involve the courts, under the guise of enforcing the antitrust laws, in the setting of prices. One goal of the antitrust laws is to allow the free market to function in a way which will minimize

the need for governmental intervention; the antitrust laws were certainly not intended as a mechanism to increase intervention in the marketplace. The courts and others have always avoided the siren's call to engage in the direct regulation of prices. *See Byars* v. *Bluff City News Co.,* 609 F.2d 843, 864 (6th Cir. 1979); *General Motors Corp. (Crash Parts),* 3 Trade Reg. Rep. (CCH) ¶21,931 (FTC 1982); 3 P. Areeda & D. Turner, *Antitrust Law* ¶736 (1978); *see also* R. Posner, *Antitrust Law: An Economic Perspective* 211 (1976). In *United States* v. *Paramount Pictures, Inc.,* 344 U.S. 131 (1948), this Court rejected a decree which required film distributors to select exhibitors based upon competitive bidding. In doing so, this Court made it clear that an antitrust decree should not involve "as close a supervision as a continuous receivership." *Id.* at 163; *see also United States* v. *Bausch & Lomb Optical Co.,* 321 U.S. 707, 728-29 (1944). While the antitrust laws may impose a duty to deal in certain cases, they do not inject the judiciary into the minutiae of setting the terms on which the parties must deal.

CONCLUSION

This Court should not permit a party to seek judicial renegotiation of contractually agreed terms of access to an "essential facility." Nor should the courts determine the terms of the contractual relationship between the parties in an "essential facilities" context unless the party in the superior bargaining position takes a posture which is tantamount to a refusal to deal. This Court should reverse the decision below with respect to the year 1977-78 because there was no re-

fusal to deal in that year and the relationship negotiated by the parties for that year should not be subject to judicial revision.

Respectfully submitted,

ROBERT E. COOPER
THEODORE B. OLSON
GIBSON, DUNN and CRUTCHER

Attorneys for Amicus Curiae

Of Counsel:

STEVE MCCRACKEN
GIBSON, DUNN and CRUTCHER

January 24, 1985

(3)

Office-Supreme Court, U.S.
FILED
FEB 28 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-510

In The

Supreme Court of the United States

October Term, 1984

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT

TUCKER K. TRAUTMAN
(Counsel of Record)
JOHN H. EVANS
OWEN C. ROUSE

IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
(303) 623-2700

Attorneys for Respondent

Of Counsel:

JOHN H. SHENEFIELD
MILBANK, TWEED, HADLEY & MCCLOY
Washington, D.C.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

59pp

QUESTIONS PRESENTED

1. Whether Petitioner can challenge for the first time on appeal the sufficiency of the evidence to create a jury issue of unlawful monopolization when Petitioner failed to present the issue, "stating the specific grounds therefor," in its motions for directed verdict before the District Court, as required by Rule 50(a), Fed. R. Civ. P.

2. Whether the evidence of Petitioner's conduct as a monopolist, including its numerous and targeted refusals to deal and other exclusionary acts, was sufficient to submit to the jury the question of whether Petitioner had unlawfully maintained or used its monopoly power in violation of §2 of the Sherman Act.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 12

ARGUMENT:

I. THE ISSUE OF MONOPOLIZATION IS NOT PROPERLY BEFORE THIS COURT 14

A. Rule 50(a), Fed. R. Civ. P., Precludes Review 15

B. Ski Co. Did Not Raise This Issue At Trial 16

II. THIS CASE WAS PROPERLY SUBMITTED TO THE JURY AND THERE WAS MORE THAN SUFFICIENT EVIDENCE TO SUPPORT ITS GENERAL VERDICT THAT SKI CO.'S CONDUCT CONSTITUTED WILLFUL ACQUISITION, MAINTENANCE OR USE OF MONOPOLY POWER IN VIOLATION OF § 2 OF THE SHERMAN ACT 18

A. The Established Test For Unlawful Monopoly Protects The Process Of Competition 19

B. Ski Co. Willfully Maintained Or Used Monopoly Power 22

C. Ski Co.'s Monopoly Power Was Not Maintained Or Used As The Result Of Superior Product, Business Acumen, Or Historic Accident 26

1. Ski Co.'s Monopoly Power Was Deliberately Acquired 26

2. Ski Co.'s Monopoly Power Was Not The Result Of A Superior Product 27

TABLE OF CONTENTS—Continued

Pages

3. Ski Co.'s Conduct Was Not An Exercise Of Business Acumen But Rather A Targeted Exclusion Of Highlands 29

III. SKI CO. DISTORTS THE LAW AND THE FACTS IN ITS ATTEMPT TO PROMOTE A RADICAL RULE OF LICENSE FOR MONOPOLISTS 34

A. Ski Co. Attempts To Justify Its Conduct By Distorting The Evidence That Was Before The Jury 35

B. Ski Co.'s Formalistic Analysis Of The Essential Facilities Cases Obscures The Evidence Here Of Substantial Anticompetitive Impact 38

C. Ski Co.'s New Test Should Not Be Adopted —Properly Stated And Applied To The Facts It Does Not Change The Result Reached By The Jury Below 44

1. Ski Co. Substantially Restrained The Opportunities Of Its Competitor 46

2. Ski Co. Substantially Restrained Consumer Freedom Of Choice 46

3. Ski Co.'s Conduct Was Predatory 47

4. Ski Co.'s Conduct Was Uniquely Monopolistic 48

CONCLUSION 50

TABLE OF CASES AND AUTHORITIES

Pages

Associated Press v. United States, 326 U.S. 1 (1945) 19

Banana Distributors, Inc. v. United Fruit Co., 162 F. Supp. 32 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959) 23

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F. 2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 31, 49

Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979) 39

California Computer Prods. Inc. v. IBM, 613 F.2d 727 (9th Cir. 1979) 33

Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) 21

Com-Tel, Inc. v. DuKane Corp., 669 F.2d 404 (6th Cir. 1982) 42

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 16

Continental Ore Cc. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 19

Continental T.V., Inc. v. GTE/Sylvania, Inc., 433 U.S. 36 (1977) 45

Coughlin v. Capitol Cement Co., 571 F.2d 290 (5th Cir. 1978) 15

Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927) 19, 23, 29, 31, 42

Follett v. National Tea Co., 460 F.2d 254 (3d Cir. 1972) 15

TABLE OF CASES AND AUTHORITIES—Continued

Pages

Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952) 41, 43

Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) 39, 41

Johnson v. New York, New Haven & Hartford Railway Co., 344 U.S. 48 (1952) 16, 17

Karjala v. Johns-Manville Products Corp., 523 F.2d 155 (8th Cir. 1975) 15

Little v. Bankers Life & Casualty Co., 426 F.2d 509 (5th Cir. 1970) 16

Lorain Journal Co. v. United States, 342 U.S. 143 (1951) 23, 24, 41

MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983) 41

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 24, 42, 43

Palmer v. Hoffman, 318 U.S. 109 (1943) 17

Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) 43

Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc., 364 F.2d 57 (8th Cir. 1966) 16

Sabin v. Berglund, 585 F.2d 955 (10th Cir. 1978) 29

Smith v. Pro-Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) 44

TABLE OF CASES AND AUTHORITIES—Continued

Pages

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 27

Telex Corp. v. IBM, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) 49

United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) 29

United States v. American Tobacco Co., 221 U.S. 106 (1911) 27

United States v. Colgate & Co., 250 U.S. 300 (1919) 28

United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973) 18

United States v. Grinnell Corp., 384 U.S. 563 (1966) ..... 19, passim

United States v. Terminal Railroad Assoc., 224 U.S. 383 (1912) 40, 41

United States v. Topco Associates, Inc. 405 U.S. 596 (1972) 42

United States v. United Shoe Machinery Corp. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) 20

Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) 21

White Motor Co. v. United States, 372 U.S. 253 (1963) 45

STATUTES AND RULES

Pages

15 U.S.C. § 2 ..... 19, passim

16 U.S.C. § 497 ..... 3, 29

Rule 50(a), Fed. R. Civ. P. 15, 16, 17

Rule 50(b), Fed. R. Civ. P. 15

36 C.F.R. §§ 251.50-251.64 29

OTHER AUTHORITIES

P. Areeda and D. Turner, *Antitrust Law* (1978) 20, 31

P. Areeda, *Antitrust Analysis* (2d ed. 1974) 40

P. Areeda, *Introduction to Antitrust Economics*, 52 Antitrust L. J. 523 (1983) 47

R. Bork, *The Antitrust Paradox* (1978) 20, 28, 40, 48

E. Fox, *The Modernization of Antitrust: A New Equalibrium*, 66 Cornell L. Rev. 1140 (1981) 47

E. Mansfield, *Microeconomics* (3d ed. 1979) 28

A. D. Neale, *The Antitrust Laws of the United States* (2d ed. 1970) 43

L. Sullivan, *Handbook of the Law of Antitrust*, (1977) 40

9 Wright and Miller, *Federal Practice and Procedure* (1971) 16

Comment, *Refusals to Sell and Public Control of Competition*, 58 Yale L. J. 1121 (1949) 22, 23

STATEMENT OF THE CASE

Aspen Highlands Skiing Corporation ("Highlands")* presents its own statement of the Questions Presented because it is dissatisfied in several respects with the statement of issues presented by Petitioner Aspen Skiing Co. ("Ski Co.").

Specifically, this appeal does not involve a "court-ordered scheme of mandatory joint marketing."[1] If Petitioner is entitled to any review, the sole issue presented here is whether the evidence of Ski Co.'s conduct was sufficient to allow the jury to determine whether Ski Co. was guilty of unlawful monopolization.[2] Accordingly, Highlands is compelled to set forth the following more detailed recitation of facts to supplement the four paragraphs devoted to that task by Ski Co. in its Brief.

---

* Highlands' listing in compliance with Supreme Court Rule 28.1 was made in the Entry of Appearance for Respondent heretofore filed with the Court.

[1] Ski Co.'s frequent invocation of this phrase and much of Ski Co.'s policy argument can be understood only as an attack upon the injunctive relief entered by the trial court, which Ski Co. never specifically challenged at trial or on appeal. After the jury verdict, the Court announced that it intended to model an injunction after the lift ticket exchange sys[illegible]willingly used by Ski Co. in Summit County, Colorado. Tr. 2341. After hearing, the Court entered an injunction, largely in the form proposed by Ski Co., to last for three years, and retained jurisdiction for that period. J.A. 193-97. When the injunction expired after the 1983-84 ski season, and at the suggestion of trial counsel for Ski Co., a stipulation extending the injunction through this appeal was executed and became an order of the District Court. Pursuant to that stipulated order, the injunction will expire at the conclusion of the 1984-85 ski season, on April 14, 1985. Highlands will not seek an extension of the injunction. Thus, the injunction will soon be a moot issue.

[2] Thus, although they were vigorously contested at trial, the scope of the revelant market, the existence of monopoly power, antitrust injury, and damages are *not* issues here.

The Development of a Lift Ticket Exchange System in Aspen

In 1962, Highlands, Ski Co. and Buttermilk Mountain Skiing Corporation ("Buttermilk") developed an innovative lift ticket exchange system in the Aspen market. J.A. 21-22, 154. Before 1962, each skier was required to purchase a lift ticket each day at one of the individual Aspen ski areas. The new product, a six-day coupon book, provided the vacation skier more convenient access to all three areas in Aspen. J.A. 21-22. With a single purchase at the beginning of their vacation, skiers had only to exchange a coupon for a daily lift ticket at any of the three areas. J.A. 21-22.

From the beginning, the allocation of revenues on the basis of actual usage was considered by the three companies to be a fair and effective way to promote competition among the companies to attract skiers to their respective areas. J.A. 22. Each company remained free to innovate, promote and develop its own ski area. J.A. 22. Each company offered its own lift tickets and participated in the exchange system at the same time. J.A. 154; Tr. 222. The development of this new product indelibly impacted the ski industry in Aspen.

In 1945, Ski Co. had obtained a special use permit[3] in order to develop Aspen Mountain, or "Ajax," a mountain

---

[3] Entry into the ski industry in Aspen generally requires regulatory approval from the United States Forest Service. Most

(Continued on next page)

suited for expert skiers. Tr. 1466-67. In 1958, the founder of Highlands obtained a Forest Service permit and began the development of a more balanced ski area at Highlands with trails laid out by two pioneers in the ski industry. J.A. 19-20, 23. In that same year, several individuals formed Buttermilk and developed the area as a teaching mountain for beginning skiers. J.A. 139-40. After three years of operation on private land at lower elevations, Buttermilk obtained a Forest Service permit allowing it to expand to the top of the mountain. J.A. 140. By the time the lift ticket exchange system was introduced in 1962, Ski Co., Highlands and Buttermilk were each competing to attract skiers to their respective ski mountains.

To compete, Highlands pursued a course of innovation from the beginning. Highlands started the first free bus system in the Aspen area to provide a convenient way for skiers to get from the lodges to the slopes. J.A. 22-23. Highlands was the first ski company in the United

---

(Continued from previous page)

of the potential skiing terrain in Aspen is administered as national forest land which must be preserved for and made reasonably accessible to the public for its "full enjoyment." 16 U.S.C. § 497. In addition to Forest Service approval, ski area development in Aspen requires approval from Pitkin County, which has been known for its restrictive "growth management" regulation. J.A. 167; Tr. 378. These federal and local regulatory barriers to entry were characterized by Ski Co.'s president as "substantial," making it "difficult" to develop a new ski area in Pitkin County, Colorado. Tr. 378.

States (and the only area in Aspen) to use the Graduated Length Method ("GLM") in its ski school, which by starting with short skis allowed novices to be skiing the entire mountain by the end of the week. J.A. 26; Tr. 307-08, 484-85. As a result, Highlands' ski school became the most popular in Aspen. J.A. 172-73. Highlands pioneered a children's ski program, which taught children as young as three years old to ski within three days. Tr. 567-68. It was so successful that many Ski Co. managers sent their own children to Highlands to learn to ski. J.A. 75-76, 79; Tr. 571. In addition, Highlands initiated NASTAR racing in Aspen, which allowed destination skiers an opportunity to race against the clock with their friends and family. J.A. 26; Tr. 687-88. Highlands was the first area in Aspen to provide free picnics for groups and to entertain its guests with acrobatic skiing and jumping exhibitions. J.A. 23, 25-26.

Ski Area Acquisitions by Ski Co.

In 1963, Ski Co. acquired Buttermilk as a wholly owned subsidiary. J.A. 113-14, 140; Tr. 1472. At about the same time, Ski Co. made an offer to acquire Highlands because Ski Co. wanted to "control" skiing in Aspen. J.A. 23-24. The offer was rejected and Highlands continued under independent ownership. Tr. 160-61.

Also, during the early 1960's, Janss Development Company ("Janss") purchased land in the Snowmass area with a view toward developing the base area and the skiing terrain. J.A. 137; Tr. 1475-76. Janss obtained

a temporary Forest Service permit and began to offer ski tours to the public in the area. J.A. 137-38; Ex. 36A, Tr. 182; Tr. 1476. Janss obtained a full permit in 1965; two years later, when the first lifts opened, Janss assigned all of its permit rights to the Snowmass Skiing Corporation, another wholly owned subsidiary of Ski Co. J.A. 138; Ex. 36D and 36E, Tr. 182; Tr. 368, 1475-76.

Thus, by 1967, Ski Co. had acquired control of three of the four ski areas in the Aspen market. Only Highlands remained independent to compete with Ski Co. During this entire period of acquisitions by Ski Co., the lift ticket exchange system continued and became far more popular with skiers than Ski Co.'s counterpart three-area, six-day ticket. J.A. 162.

Creation of Aspen Reservations, Inc.

In 1973, the marketing director of Highlands developed the idea of Aspen Reservations, Inc. ("ARI"), which became a joint venture between the ski companies combining a central reservation service with the marketing of a convenient around-the-neck, four-area ticket.[4] J.A. 24-25; Ex. 2, Tr. 162. Beginning in the 1973-74 ski season, the two ski companies, through ARI, marketed the Aspen resort, offered the four-area ticket, and divided the revenues based on an independent survey of patronage.[5] J.A. 24-25.

---

[4] This format was far more convenient to the skier than the coupon book since there was no need to stand in a ticket line to exchange coupons each day.

[5] The marketing through ARI included films, ski shows, and even a sign at Denver's Stapleton Airport, all designed to attract skiers to come to the Aspen community, and, once there, to purchase the convenient four-area ticket. J.A. 38-40, 104-05;

(Continued on next page)

This enterprise was a clear success. Apart from one poor snow season, the Aspen market enjoyed a steady growth in destination skier visits. Ex. 97, J.A. 183. Customer convenience and choice were enhanced because, with a single purchase at the beginning of their stay, vacationers could ski any combination of the four areas in Aspen. J.A. 24-25. The four-area ticket increased in popularity. J.A. 31. During this period of vigorous competition between the companies, each sought to increase its usage, and thus revenues from the four-area ticket sales, through innovation and improvements to its own skiing facilities.[6] Highlands' share of destination skier visits grew steadily. Ex. 97, J.A. 183.

Ski Co.'s Exclusionary Activities

In 1977, Ski Co. offered to continue participation with Highlands in the sale of four-area tickets only on the condition that Highlands accept a fixed percentage of the revenues rather than a share based upon actual usage. Tr. 270-71. Highlands instead sought to maintain the division of revenues on the basis of actual usage so that each company would keep the incentive to compete

---

(Continued from previous page)

Ex. 60, Tr. 182. Like the revenues, these marketing expenses were apportioned upon the basis of usage of the four-area ticket. Tr. 823-24. Thus, the thrust of this arrangement was precisely to avoid the "free rider" problem theorized by Ski Co. Pet. Br. 25-27.

[6] For example, Highlands added a new lift in 1975, and thereafter pursued a plan for major expansion, which was substantially delayed awaiting Forest Service and county approvals. J.A. 59; Tr. 279, 285-86. Trails were significantly expanded. Tr. 202. Innovations by Highlands during this period included free picnics, acrobatic skiing, ski patrol jumps, NASTAR, and the children's ski program. J.A. 25-26, 36; Tr. 567-68.

for its revenue share. Ski Co. refused. J.A. 28, 30; Tr. 270-73. Highlands also sought to purchase Ski Co. tickets in bulk so that Highlands could itself package and market a four-mountain ticket.[7] J.A. 32-33. Ski Co. again flatly refused, despite the fact that it continued to sell its tickets to tour operators and travel agents for packaging and resale.[8] J.A. 33-34; Ex. 45C, Tr. 182; Tr. 828.

Finally, when there was no other way to continue a four-area package, Highlands accepted a fixed 15% of the revenues. J.A. 30. Ski Co. then agreed to continue the four-area ticket for that year. Tr. 273. Also in 1977-78, Ski Co., for the first time since the 1972-73 ski season, marketed and sold its own three-area, six-day ticket, which was valid only at Ski Co. mountains. Tr. 583-84. That year, the four-area ticket outsold the Ski Co. ticket by almost two-to-one. J.A. 83, 94.

Again in 1978, Ski Co. proposed to continue the four-area ticket only on the condition that Highlands accept a fixed 12½% share of revenues, an even lower percentage

---

[7] Both ski companies sold their individual lift and four-area tickets at two distribution levels, wholesale and retail. At wholesale, multi-day tickets were sold to tour operators and travel agents who would package them with other products, such as lodging, ground transportation and other skiing services, to be resold to consumers. J.A. 117-18. The wholesale discount took the form of a commission, usually 10-15%. J.A. 38; Tr. 322-23, 828, 831. These wholesale sales represented about 15-20% of the revenues of the ski companies. J.A. 163. In addition, both ski companies sold these tickets directly to skiers at retail after they had arrived in Aspen, accounting for approximately 80-85% of the ski companies' revenues. J.A. 92, 163; Tr. 623.

[8] Travel agents and tour operators compete with their suppliers, the ski companies, since they both market packages to the skiing public at retail. J.A. 118. It is customary for these competitors to package tickets of more than one ski area in a destination resort. Tr. 1034-36.

than offered the year before. Highlands rejected this offer because it was unjustified by actual usage and removed all incentive to compete. J.A. 29-30. Highlands suggested other means to allow continuation of a four-area ticket, including a return to the coupon book concept. J.A. 29. Ski Co. refused these suggestions, even though it participated in similar lift ticket exchange systems in every other market in which it operated ski areas.[9] J.A. 29-30. Consequently, for the 1978-79 ski season, the previously available four-area ticket was eliminated.

In order to compete for the business of multi-area skiers, Highlands attempted to develop its own four-area package. J.A. 40-41. Highlands again offered to buy Ski Co. tickets in bulk. J.A. 42-43. Again, Ski Co. refused to sell. J.A. 43-44, 46-47. At that point, Highlands, determined to keep a convenient four-area option available for skiers, created the "Adventure Pack," which combined a Highlands' three-day ticket and three coupons, each equal to the price of a daily lift ticket at Ski Co. mountains. J.A. 43. The coupons were fully guaranteed by funds in an Aspen bank and were intended to allow skiers to exchange them for lift tickets at Ski Co. mountains or redeem them for cash at any local merchant

---

[9] Ski Co. was already participating in a ticket exchange system in Summit County, Colorado. There, Ski Co. operated one ski mountain and two independent competitors operated three other mountains. Tr. 1071, 1082, 1097. In the 1970's the companies implemented a four-area ticket exchange system, similar to that begun in Aspen in the 1960's, using coupon books and dividing revenues on the basis of usage. Tr. 1071-72, 1102. Ski Co. continued its participation there through the time of trial. Tr. 1071. Beginning in the 1980-81 ski season, Ski Co. opened its Blackcomb Mountain ski area in Canada next door to an established competitor, Whistler Mountain, and immediately entered into an interchangeable ticket arrangement. J.A. 111-12.

if they wanted a day of rest from skiing. J.A. 44-46. Yet, when skiers presented these coupons to Ski Co. for exchange, they were refused, even though the coupons were as secure as any other exchange media customarily accepted by Ski Co., and were freely redeemed by other businesses in town. J.A. 44-46; Tr. 623-24, 1687-88.

Ski Co.'s chief financial officer admitted that its refusals to accept the Adventure Pack coupons made Highlands' package less attractive, J.A. 85, and were directed at Highlands because it was "our competition." J.A. 46. During this exact time, Ski Co. continued to accept virtually identical coupons from its competitors and customers in Summit County, Colorado. Tr. 1688. In 1979, after Highlands replaced the rejected coupons with more costly traveler's checks and money orders, J.A. 62, 67, and after the filing of this lawsuit, Ski Co. accepted the medium of exchange. Tr. 628.

Ski Co.'s campaign to become the only supplier of multi-mountain lift packages in Aspen extended to other unseemly activities. In 1978, Ski Co. unilaterally appropriated the sign at Stapleton Airport in Denver (erected previously with funds supplied in part by Highlands), eliminated its reference to Aspen's four mountains and substituted its own three-area "Aspen" promotion. J.A. 105-06; Ex. 60, 62, Tr. 182. In addition, Ski Co.'s own advertising distorted information available to consumers by deceptively equating the word "Aspen" with Ski Co. to convince consumers that the Aspen resort complex was comprised of three mountains and that Ski Co.'s three-area ticket provided full access to all of Aspen's skiing terrain. J.A. 100-01, 107-09; Ex. 66, 67, Tr. 182. Ski Co. even

produced a nationally distributed advertisement that depicted an aerial photograph of the mountains of Aspen, brazenly mislabeling Highlands as "Buttermilk." J.A. 109-10; Ex. 103, J.A. 184. As a result of these activities, newcomers to Aspen were misled; return visitors, confused.[10]

The Effect on the Competitive Process

Thus, by the time this case was brought to trial, Ski Co. had successfully eliminated the four-area package as a consumer alternative in the marketplace.[11] J.A. 132. With its efforts to market a four-area package continually frustrated, Highlands could not compete effectively. J.A. 100.

Skiers came to Aspen in large part because of the variety of skiing available. J.A. 90-91. Destination skiers who intended to ski a full six days during their stay demanded convenient access to this variety. J.A. 94-95, 120; Tr. 981-84, 1029-30. By 1977, their purchases of multi-mountain, six-day tickets accounted for 35-40% of the lift revenues of both companies. J.A. 84; Tr. 1367. The extent of the access provided by these tickets also influenced the daily lift ticket purchases of less vigorous skiers who came to Aspen accompanying purchasers of six-day tickets. Tr. 1209. On the days these daily lift ticket purchasers skied, they generally skied with family or group members who had purchased six-day tickets. J.A. 95-96, 130. Thus, foreclosure from offering a four-mountain ticket impacted both Highlands' multi-day and daily lift ticket sales. J.A. 130.

As another result of such foreclosure, participation in the Highlands' ski school also declined, although this product was still perceived by skiers and Ski Co. management as superior to others in Aspen. J.A. 76-77, 120-23, 172-73; Tr. 488-89, 1391-92, 1394-95. By the time of trial, Highlands had fallen well below its economic break-even point and its destination skier visits continued on a downward trend.[12] Ex. 97, J.A. 183; Tr. 1363-64.

The decline in Highlands' ability to compete also constrained consumer choice. From 1977 on, skiers who had purchased Ski Co. tickets repeatedly came to ski at Highlands, mistakenly assuming that their tickets gave them access. J.A. 50-51, 77-78, 86-87, 115-16. As a practical matter, at that point, in order to ski at Highlands, skiers had to sacrifice one day of skiing they had already bought from Ski Co. and purchase an additional day from Highlands, or seek a refund from Ski Co., which most skiers did not know was available.[13] Those skiers who stumbled

---

10 First-time visitors to Aspen, who comprise 20% to 25% of skiers annually and are crucial to continued growth in consumer patronage, could easily purchase Ski Co.'s three-area, six-day ticket in the mistaken belief that they were thereby securing access to all of the skiing in Aspen. J.A. 100-01, 104-10. Return visitors to Aspen frequently bought Ski Co.'s three-area, six-day ticket, assuming that it was the four-area ticket with which they were previously familiar, only to be sorely disappointed when they discovered that the ticket could not be used at Highlands. J.A. 50-51, 77-78, 86-87, 115-16.

11 Shortly before trial, Ski Co. raised its individual daily lift ticket prices over 22% from the previous year, J.A. 71-72, 132; Tr. 390-92, but, by contrast, only raised the retail price of its six-day ticket by 12%. J.A. 72; Tr. 391-92. Highlands could not merely pass on the daily lift ticket cost increase to the consumer, given Ski Co.'s deeply discounted alternative. J.A. 132. Highlands' chief financial officer testified that these pricing actions by Ski Co. made Highlands' continuation of the Adventure Pack impossible. J.A. 132.

12 Accordingly, Highlands was forced to tighten its budget. J.A. 130-31; Tr. 1399-1403. Costly national advertising of the Adventure Pack was cut back. J.A. 131.

13 Ski Co. would explain its refund policy only if asked by the skier. J.A. 161. Two long-time and sophisticated buyers of skiing in Aspen, a tour operator and ski club leader, were surprised to learn that the policy even existed. J.A. 114-15, 121-22.

upon Ski Co.'s refund policy found that to use it they had to give up the six-day discount and lose a half day of skiing in the process.[14] J.A. 51-52, 86-87; Tr. 1670. Faced with those options, most skiers, by now frustrated and angry, left Highlands and used Ski Co. mountains exclusively.[15] J.A. 51-52, 86-88. They were not happy about it. In a consumer survey performed by Ski Co.'s marketing expert in the 1979-80 ski season, over 50% of responses by those surveyed indicated that because their tickets were not valid for Highlands, they would not ski there during their Aspen stay, even though they wanted to. J.A. 95.

SUMMARY OF ARGUMENT

Petitioner argues that some new rule or *per se* test should be invoked to, in effect, take this case from the jury and give Ski Co. a directed verdict in the United States Supreme Court on one question—whether there was sufficient evidence to create a jury issue on unlawful monopolization. This contention is untenable. Ski Co. never challenged the sufficiency of this evidence at trial and never asked for a directed verdict on monopolization. Thus, this Court can and should summarily affirm on this basis alone.

---

14 Ski Co. often sent skiers across town to the tour operator who sold them the ticket to secure a proper refund. J.A. 123-24.

15 Although often well-to-do, Aspen skiers were cost-conscious and thus did not spend additional money on daily lift tickets at Highlands, having already purchased the Ski Co. six-day ticket. J.A. 75, 88, 95-96, 119; Tr. 713-15.

If the Court reaches the issue of unlawful monopolization, Ski Co.'s substantial amount of exclusionary conduct, including targeted refusals to deal, clearly raised a proper jury issue under traditional § 2 jurisprudence. Taken as a whole, Ski Co.'s conduct went well beyond acceptable methods of competition and instead destroyed the competitive process in Aspen.

When Highlands devised a better way to market skiing services in Aspen, Buttermilk, Snowmass and Ski Co. eagerly joined the effort. The innovation was a great success. Skiers came to Aspen in increasing numbers. More and more of them demanded the multi-area tickets. While all of Aspen's ski areas benefited, each area nevertheless continued to compete to attract skiers to its mountain after they had arrived in Aspen.

Ski Co. then arrogated to itself the exclusive enjoyment of the fruits of this effort. First, it embarked upon an announced scheme to control skiing in Aspen. It attempted to acquire all the ski areas, and succeeded in getting three out of four. Then, using the threat of destroying the four-area ticket, it extorted more than the usage-based share of the revenues it would have received based solely on its competitive merit.

In order to destroy its remaining rival in Aspen, Ski Co. abandoned the competition it had previously pursued in Aspen, and continued to pursue in another multi-mountain market. Instead it deprived consumers of the product they wanted most—a four-area ticket—and targeted Highlands with a series of refusals to deal and a panoply of other exclusionary tactics. It refused to sell tickets to Highlands. It refused to deal with skiers who had purchased Highlands' four-mountain package. It tore down advertising Highlands had financed. It advertised a mar-

ket from which Highlands' identity had been erased. It used the by-now-familiar format for its reinstated three-area ticket and led skiers into believing they had purchased a four-area ticket. It ignored reports that a substantial portion of the skiers in its captive market were not satisfied with the substituted product. It fostered a widespread misconception that skiers were locked into the three-area ticket once they had purchased it. It manipulated its prices in a way precisely suited to doom the Adventure Pack.

Ski Co.'s conduct produced the intended effect: excluded from a huge segment of the market that it had helped create, Highlands' ability to compete effectively was severely damaged. The jury correctly concluded that Ski Co. had monopolized the market.

Petitioner attempts to justify its conduct here by the liberal use of distortions of the evidence and hypothetical facts that are not before this Court in this case. To measure its conduct, Petitioner urges new unduly restrictive tests, which are unnecessary and rely upon formalistic categorizations supported neither by precedent nor logic. In a final effort to salvage its position, Ski Co. asks this Court to turn away from its fact-sensitive conduct evaluation in § 2 cases and instead establish a new rule of *per se* legality, immunizing Ski Co.'s unambiguously exclusionary conduct. All of these attempts should be rejected and the result below, affirmed.

—o—

ARGUMENT

I. The Issue Of Monopolization Is Not Properly Before This Court.

The monopolization issue in this case was tried and presented to the jury as a traditional exclusionary conduct case. Highlands proposed to show that Ski Co.'s conduct was unreasonably exclusionary, and thus an abuse of monopoly power. Pet. App. 13a. Ski Co.'s trial strategy was to show that its conduct was reasonable and justified by valid business reasons. The District Court adopted the monopolization instructions proposed by Ski Co., and instructed the jury that a monopolist had no "duty to cooperate with its business rivals," and may "refuse to deal with a competitor . . . if valid business reasons exist for that refusal." Compare J.A. 181-82 with 185-86. Significantly, at no point during the trial did Ski Co. even suggest that, as a matter of law, the question of abuse of monopoly power should be taken from the jury for lack of sufficient evidence. It willingly submitted that issue to the jury and lost. Ski Co. should not be able to retry that issue here on its newly proposed theories.

A. Rule 50(a), Fed. R. Civ. P., Precludes Review.

Having declined to challenge the sufficiency of the evidence in its motions for directed verdict at trial, Ski Co. cannot, as a matter of both sound procedure and good conscience, be allowed to raise the issue for the first time on appeal.[16] To preserve an issue for appeal, a motion for directed verdict must comply with Rule 50(a), Fed. R.Civ.P., which requires that the motion "shall state the specific grounds therefor." As this Court has ruled with regard to the parallel provisions of Rule 50(b), specificity and strict compliance with the requirements of the rule

---

[16] *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978); *Karjala v. Johns-Manville Products Corp.*, 523 F.2d 155, 157 (8th Cir. 1975); *Follette v. National Tea Co.*, 460 F.2d 254 (3d Cir. 1972).

are necessary so that a party will not "have [its] opportunity to remedy any shortcomings in [its] case jeopardized by a failure to fathom the unspoken hopes of [opposing] counsel." *Johnson v. New York, New Haven & Hartford Railway Co.*, 344 U.S. 48, 51 (1952); *cf. Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947). The same specificity is necessary under Rule 50(a) to advise the trial court and the opposing party adequately of the legal theories upon which a party is relying and to preclude a party from gambling upon a verdict.[17] Ski Co. provided no such illumination to the court or to Highlands. Rather, apparently satisfied with the instructions it had proposed on monopolization and confident about the strength of its business justification defense, it gambled upon a favorable verdict at trial. It should not be allowed a second roll of the dice on appeal.

B. Ski Co. Did Not Raise This Issue At Trial.

To reach the issue of whether there was sufficient evidence of unlawful monopolization, the Court of Appeals erroneously concluded that two cryptic statements by trial counsel in Ski Co.'s motions for directed verdict had properly raised a monopolization issue. Pet. App. 14a. However, the Court of Appeals overlooked both the context of these statements, which was completely unrelated to the issue,[18] and the fact that the statements make no mention of the sufficiency of the evidence to

---

17 *Ralston Purina Co. v. Parsons Feed & Farm Supply, Inc.*, 364 F.2d 57, 59-60 (8th Cir. 1966); *Little v. Bankers Life & Casualty Co.*, 426 F.2d 509 (5th Cir. 1970); 9 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE § 2533 at 579 (1971).

18 In both motions, Petitioner's trial counsel raised only two issues dealing with the § 2 claim—the scope of the relevant market and the non-existence of monopoly power as a matter of law. The statements adverted to by the Court of Appeals were made in conjunction with Petitioner's relevant

(Continued on next page)

prove monopolization. The Court of Appeals' cursory treatment of these significant lacunae completely subverts the "specificity" requirement of Rule 50(a).

The adequacy of Ski Co.'s "motions cannot be measured by its unexpressed intention or wants."[19] To do so deprives the trial court of its proper function to review these factual issues in the first instance. Clearly, the trial judge never understood Ski Co.'s trial counsel to be urging the court to take the monopolization issue from the jury: her ruling on Ski Co.'s motion for directed verdict makes no reference whatsoever to the issue. Tr. 1461-62. Ski Co.'s trial counsel sought no clarification at the conclusion of the ruling. Tr. 1462.

Again, when Ski Co. renewed its motion in shorthand at the close of all the evidence, the trial judge did not address the issue in her ruling on the motion.[20] As

---

(Continued from previous page)

market and monopoly power arguments. The first was a statement that "there clearly cannot be a requirement of cooperation between competitiors" made in the context of counsel's argument on the relevant market issue. Tr. 1452. The second was a statement that "a company like Aspen Skiing Corporation is required to compete." J.A. 133-34. Ski Co.'s counsel was arguing that there was no evidence Ski Co. possessed monopoly power and that its duty to compete essentially prevented it from attaining such power. Tr. 1453-54. He was not arguing that the evidence of Ski Co.'s conduct was insufficient to establish unlawful monopolization.

19 *Johnson v. New York, New Haven & Hartford Railway Co.*, 344 U.S. at 51. *Cf. Palmer v. Hoffman*, 318 U.S. 109, 119-20 (1943) (specificity required in objecting to jury instruction).

20 Ski Co.'s trial counsel merely incorporated "the arguments made at the close of Plaintiff's case" and stated that:

> In all of the issues, including both the Section 2 and the Section 1 issues that Plaintiff has proved our case under the decisions cited in our trial brief.

J.A. 180. Ski Co.'s counsel then briefly restated his relevant market and monopoly power argument but made no mention of any issue concerning unlawful monopolization. J.A. 180; Tr. 2192.

before, Ski Co.'s trial counsel sat by quietly at the conclusion of her ruling. Tr. 2212. It is inconceivable that, if Ski Co. intended to argue at trial, as it so vigorously contends here, its conduct was lawful as a matter of law, it would not even request a specific ruling on that point from the trial judge.

The failure to raise this issue in the trial court was not mere oversight. Instead it was part of Ski Co.'s trial strategy. Both in its trial brief and the instructions it proposed on the issue of monopolization, Ski Co. acknowledged that resolution of the issue would depend upon an evaluation of the reasonableness of the conduct that Highlands challenged. Petitioner allowed the issue to be presented to the jury without objection as to sufficiency, and thus cannot now, by means of a post-trial "theory transplant," seek appellate reversal of the judgment for reasons not asserted below.[21]

II. This Case Was Properly Submitted To The Jury And There Was More Than Sufficient Evidence To Support Its General Verdict That Ski Co.'s Conduct Constituted Willful Acquisition, Maintenance Or Use Of Monopoly Power In Violation Of § 2 Of The Sherman Act.

Even if Ski Co. is entitled to a review of the sufficiency of the evidence, the judgment was amply supported and must be affirmed. A successful antitrust plaintiff defending a jury verdict on appeal "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wip-

---

21 *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 575 (1973) (Rehnquist, J., dissenting).

ing the slate clean after scrutiny of each."[22] Moreover, all of the evidence and inferences must be viewed in the light most favorable to Highlands.[23] Unless it can be determined as a matter of law from the evidence that a defendant could not be guilty of monopolization, the jury's decision on this question of fact is conclusive.[24]

A. The Established Test For Unlawful Monopoly Protects The Process Of Competition.

After 75 years of Supreme Court jurisprudence under § 2 of the Sherman Act, 15 U.S.C. § 2, this Court's description of unlawful monopolization was succinctly stated in *United States v. Grinnell Corp.*:

> [t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintaintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

384 U.S. 563, 570-71 (1966).

A monopolist whose power is sustained or enhanced by practices that go beyond competition has monopolized in violation of § 2.[25] By deliberately seeking to maintain

---

22 *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). *See also Associated Press v. United States*, 326 U.S. 1, 14 (1945).

23 *Continental Ore Co.*, 370 U.S. at 696.

24 *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927).

25 "In sum, 'exclusionary' behavior should be taken to mean conduct other than competition on the merits, or other than restraints reasonably 'necessary' to competition on the merits, that reasonably appear capable of making a significant con-

(Continued on next page)

or enhance market power "through means that would not be employed in the normal course of competition,"[26] the unlawful monopolist goes beyond competition on the merits, and thereby unnecessarily impairs the opportunities of rivals.[27]

Whether conduct is competition on the merits or exclusionary will frequently not be evident without an exploration of the market context. It is not sufficient in this case, therefore, to attempt to evaluate Petitioner's conduct simply by the process of formalistic categorization suggested by Ski Co. Rather, the refusals to deal and other conduct found by the jury at trial to have violated § 2 are exclusionary if, as in this case,[28] the exercise of monopoly power has the effect in the short run of disadvantaging competitive firms, perhaps even driving them out of the market, in an effort to gain larger profits in the long run.

(Continued from previous page)

tribution to creating or maintaining monopoly power." III P. Areeda and D. Turner, ANTITRUST LAW ¶ 626c at 79 (1978); and see *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 344-45 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), in which the court similarly condemned practices that " . . . represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production and distribution which a competitive society must foster."

26 R. Bork, THE ANTITRUST PARADOX, 144 (1978).

27 *See* III P. Areeda and D. Turner, *supra* note 25, ¶ 626b at 78 (1978).

28 Ski Co. grudgingly acknowledges the need for a close look at the market. Conduct may be exclusionary for a monopolist that would not be exclusionary for ordinary competitors. The determining factor is "its competitive effects in the actual circumstances." Pet. Br. 18, n. 20.

The *Grinnell* definition of unlawful monopolization has served to guide lower courts and juries for almost twenty years,[29] and it was the basis of the jury instructions in this case. It properly legitimizes a monopolist's competition on the merits while it condemns the exercise of monopoly power that goes beyond, and thereby unreasonably damages, competition.

Ski Co. has presented no cogent rationale for departing from this standard, which it espoused at trial, other than the fact that, if the traditional standard applies, submission of the case to the jury was clearly proper and the judgment must be affirmed.

---

29 To the extent that lower courts and commentators have expressed dissatisfaction with the *Grinnell* formulation, their complaint has generally focused upon the extent to which "intent" is relevant in determining whether there has been an abuse of monopoly power. Obviously, the injury element of a private action is present only because of conduct, not just intent. Nevertheless, as Ski Co. acknowledges, Pet. Br. 41, evidence of intent is relevant in gauging the nature of ambiguous conduct. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 n. 12 (1967). While the conduct at issue here was unambiguously anticompetitive, it is certainly illuminating to evaluate that conduct in light of Ski Co.'s announced intent, at the time it sought to acquire Highland's: "well, what we want to control is skiing in Aspen." J.A. 23-24. Ski Co. did not seek to exclude such intent evidence at trial, nor did it seek an instruction regarding its lack of relevance.

Ski Co.'s attack, Pet. Br. 40-44, upon the Court of Appeals for relying upon a theory of anticompetitive intent as one basis for affirming the judgment is misplaced. A reading of the court's opinion makes it clear that it, like so many other courts addressing the issue, was speaking in terms of intent but was actually analyzing conduct and the impact of that conduct upon consumers and upon the competitive process.

B. Ski Co. Willfully Maintained Or Used Monopoly Power.

Ski Co. repeatedly refused to sell tickets to Highlands or to deal with its customers.[30] Only Highlands was the target of such refusals, while Ski Co. willingly dealt with every other comparable competitor. It reinforced special treatment of Highlands with extortionate demands and distorted advertising. The impact of this conduct was aggravated by—indeed, it depended upon—Ski Co.'s monopoly power, which it used to prevent Highlands from being able to compete for a major portion of the market. Under the objective standard set forth in *Grinnell*—honest competition or exclusionary conduct—the jury properly found the refusals unlawful.

"A producer in a purely competitive market will ordinarily sell to all comers. He will refuse only if his entire output is already spoken for, or if the sale would be unprofitable, or if the would-be buyer is a poor credit risk."[31] Under conditions of effective competition, a ra-

---

30 Ski Co. attempts to explain away this admittedly "unusual conduct" by an argument that, ignoring the record, paints a picture of minimal effect and advances several business justifications for what it characterizes as mere "refusals to engage in cooperative marketing." Pet. Br. 28-30. This argument ignores all the evidence of the context in which the refusals took place, ignores Ski Co.'s announced motives, and ignores the obvious impact of the refusals upon Highlands and upon consumers. To accept it would be tantamount to concluding, as Ski Co. later expressly requests, that a monopolist's refusal to deal with a competitor is *per se* lawful. Ski Co.'s only support for this position is a recitation of hypotheticals, Pet. Br. 30-32, not before the Court in this case. Presumably if such cases ever arose with real facts, the monopolist involved would have valid business reasons to justify its refusals under existing law.

31 Comment, *Refusals to Sell and Public Control of Competition*, 58 Yale L.J. 1121 (1949).

tional firm knows that customers with whom it arbitrarily refuses to deal can simply trade with another firm.

Not so in the case of a firm with monopoly power. The competitive consequences of a monopolist's refusal to deal cannot be remedied through marketplace discipline.[32] Rejected customers cannot simply turn to another source of supply. Thus, a seller such as Ski Co. can utilize a refusal to deal as a device to restrict output or to discipline customers and competitors. "Moreover, he has a weapon with which to extend his power over the market."[33]

There is nothing novel about the result in this case. This Court early recognized that a refusal to sell by a firm possessing monopoly power must be scrutinized like any use of market power.[34] A monopolist's right to refuse to deal is not absolute.[35] Where a monopolist has arbitrarily refused to sell to a former customer who desired to compete at the retail level, *Eastman Kodak Co.*, 273 U.S. 359, where a monopolist has refused to sell to cus-

---

32 *See Banana Distributors, Inc. v. United Fruit Co.*, 162 F. Supp. 32, 37 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959) (distinguishing between an individual trader's prerogative to refuse to deal, which can be remedied through the marketplace, and an anticompetitive refusal to deal by a monopolist, which cannot be remedied through marketplace discipline).

33 *Refusals to Sell and Public Control of Competition*, *supra* note 31, at 1121.

34 *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

35 *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951).

tomers who deal with a competitor, *Lorain Journal Co.*, 342 U.S. 143,[36] or where a monopolist has refused to sell to potential competitors, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), this Court has consistently upheld the factfinder's scrutiny of the conduct and found the refusals unlawful.[37] Implicit in each result is the recognition that the adverse competitive consequences of the refusals were beyond market discipline, resulting in actual damage to the competitive process.[38] In each instance, the monopolist failed to demonstrate any business justification or redeeming competitive benefit to legitimize its otherwise exclusionary behavior.

This application of the *Grinnell* formulation in the refusal-to-deal context provides an economically rational, objective and workable framework for judging the competitive impact of a monopolist's conduct. It also provides businesses with a reliable guide to behavior. If their conduct goes beyond normal means of competition or efficient behavior and is not justified by any competitive benefits, it is unlawful.

---

36 Like the purchasers of advertising in Lorain, Ohio, skiers in Aspen wanted to buy services from more than one supplier. The suppliers offered interchangeable products that consumers wanted in full variety. In each case, the stronger seller used its power to deny consumer wants. In each case, the impact on competition was the same—the refusals "amounted to an effective prohibition of the use of" the smaller competitor's products. *Id.* at 153.

37 The issue in each of these cases was not the existence of some abstract "duty to cooperate" but whether a specific refusal was unlawful in the factual context in which it arose. The same is true here. Ski Co.'s contention that an affirmance of the verdict below creates a "duty to cooperate" completely ignores both this critical distinction and that the jury was told no such duty existed.

38 Here, Ski Co. stood to gain a complete elimination of competition in Aspen through its refusal to deal.

That Ski Co.'s conduct was fundamentally different from that of a firm in a competitive market need not be merely theorized—it is proven by Ski Co.'s own conduct in other markets in which it does not possess monopoly power. In Summit County, Colorado, Ski Co.'s subsidiary operates only one of four areas. Its Blackcomb Mountain operation in Canada was in a region containing two independent ski areas. In Aspen before 1967, Ski Co. had not solidified its control of the market. In each of those three situations, Ski Co.'s behavior reflected the presence of effective competition. It actively encouraged skiers to purchase convenient, full-variety, multi-area tickets. To have done otherwise would have been self-defeating: skiers could simply shun an area that denied them the variety they wanted. It divided revenues from the multi-area ticket on the basis of usage. Any other system would simply not have been tolerated. J.A. 126-27. Indeed, a refusal to deal by Ski Co. in any other market would not have been protected by its monopoly power nor could it have been used to achieve or maintain such power. Thus, there was powerful evidence from Ski Co.'s own behavior that a rational competitor, interested in competition on the merits rather than exclusion, would not have acted as Ski Co. did in Aspen. This evidence was more than adequate to support the jury's conclusion that Ski Co. had monopolized in violation of § 2.

C. Ski Co.'s Monopoly Power Was Not Maintained Or Used As The Result Of Superior Product, Business Acumen, Or Historic Accident.

As *Grinnell* requires, the jury was instructed to consider whether the monopoly power of Ski Co. was maintained or used as the result of "superior product, business acumen, or historic accident." There was ample evidence for the jury to conclude that none of these conditions was present, and that Ski Co.'s conduct represented solely the unjustified exercise of monopoly power to prevent competition.

1. Ski Co.'s Monopoly Power Was Deliberately Acquired.

Despite Petitioner's repeated assertions to the contrary, the evidence showed that Ski Co.'s monopoly power in Aspen resulted not from the growth of a company with an innovative product, but rather from a systematic pattern of acquisition,[39] leading it to become the largest skiing company in North America. Tr. 370. As its president admitted, Ski Co. has "intentionally sought out other ski areas to acquire." Tr. 375. Indeed, as a part of its plan to control skiing in Aspen, Ski Co. made an earlier un-

[39] American Airlines, Inc., in its Brief Amicus Curiae, shares the confusion—Ski Co. is mistaken for a firm which has obtained a market advantage "as a result of its own lawful innovation and initiative." Amicus Brief at 2. From this, Amicus concludes that the "developer-owner of an innovation" has a right to drive a hard bargain for the use of that innovation. *Id.* Like Petitioner, Amicus advances a theory that ignores an ugly fact—Highlands had an equally strong claim to the title of developer, owner and innovator. Ski Co. tried to usurp the title by merger and exclusion.

successful attempt to acquire Highlands. J.A. 23-24; Tr. 159-61.[40]

Thus, Ski Co. has eliminated its competitors by acquiring them. The acquisition of competitors to create a monopoly has itself been a violation of § 2 from the earliest days of Sherman Act enforcement. *See, e.g., Standard Oil Co. v. United States,* 221 U.S. 1 (1911); *United States v. American Tobacco Co.,* 221 U.S. 106 (1911). Here, however, the significance of Ski Co.'s acquisitions is that it thereby acquired the leverage, and indeed the appetite, to prevent Highlands from offering a competitively superior four-area ticket, thus denying consumers access to the product they wanted most. Accordingly, Ski Co.'s acquisition history, including its announced purpose, sheds light on the exclusionary nature of Ski Co.'s subsequent conduct directed at its remaining competitor in Aspen.

2. Ski Co.'s Monopoly Power Was Not The Result Of A Superior Product.

The evidence at trial clearly showed that Ski Co.'s increasing market share and market power were not the result of a superior product.[41] So long as a form of four-area lift ticket exchange system was available, Highlands' market share steadily grew. Later, after Ski Co. had solidified its control over destination skiers in Aspen, Highlands' market share dropped, not *because* of product

[40] In 1976, another suitor of Highlands, Twentieth Century Fox ("Fox"), explored the possibility of such control. Tr. 206, 2074. In that period, Fox evaluated acquisition of all four areas in Aspen, including Highlands, but gained control only of Ski Co.'s mountains. Tr. 370, 2083.

[41] Any argument that the Ski Co. three-area ticket is the superior product is demonstrably wrong. Indeed, for most of the recent period in which a four-area ticket was available, Ski Co. chose not to offer a three-area ticket at all. And when Ski Co. reinstated the three-area ticket in 1977, the four-area ticket outsold it by a ratio of two-to-one.

quality considerations, but *in spite* of them. Over 50% of the responses from Ski Co. skiers in one survey disclosed that they wanted to ski at Highlands but could not because the Ski Co. ticket precluded them from doing so.[42] Thus, Ski Co.'s course of conduct was designed not to emphasize the relative merits of its own skiing product, but rather, to prevent consumers from exercising their freedom of choice based on their own assessment of those relative merits.[43]

Ski Co. suggests that this Court should defer to Ski Co.'s prerogative to choose its customers because it "engaged in an entirely private business." Pet. Br. 34, n. 35, *citing United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Yet, even *Colgate* recognized that the exercise of monopoly power requires a different analysis. *Id.* This is especially true where the dominant firm's product is derived in part from its status as a permittee on public lands, with the obligation to provide access to the public

---

42 The rational consumer will try to maximize utility. In the context of consumer choice, maximum utility is determined by satisfaction with the product. E. Mansfield, MICROECONOMICS 50-51 (3d ed. 1979). Rational consumers in Aspen testified that they were deprived of the choice to buy a superior product (a four-area ticket) and as a result, access to an equally attractive product (a day at Highlands) became more expensive and inconvenient. J.A. 95-96, 120-21; Tr. 1029-30.

43 Ski Co.'s contempt for skier frustration, Pet. Br. 45-46, reflects a monopolist's arrogant indifference to consumer preference. Fortunately, however, one important function of the antitrust laws is to "preserve, improve, and reinforce the powerful economic mechanisms that compel businesses to respond to consumers." R. Bork, *supra* note 26, at 91.

for its "full enjoyment."[44] Thus, Ski Co.'s exclusionary conduct not only impairs competition on the merits, it also directly infringes upon public rights to use public resources.

3. Ski Co.'s Conduct Was Not An Exercise Of Business Acumen But Rather A Targeted Exclusion Of Highlands.

At trial, Ski Co.'s primary strategy was to convince the jury that its conduct reflected only legitimate management decisions. Because there was substantial evidence to support the jury's inference that Ski Co.'s conduct served only its pursuit of monopoly power, those arguments should be given short shrift here.[45]

The jury could properly have concluded that Ski Co.'s conduct on the whole was not "honestly industrial."[46] Specifically, it was proper for the jury to infer that it was no reflection of a "desire to compete" when, for two seasons running, Ski Co.'s toll for allowing a four-area

---

44 The ski areas in Aspen are located primarily on public lands and the privilege of using those lands is granted by Forest Service special use permits. *See* 36 C.F.R. §§ 251.50-251.64. These permits grant an exclusive right to operate ski facilities in portions of the national forest. Such a permit is therefore "tantamount to a certificate of public convenience and necessity." *Sabin v. Berglund*, 585 F.2d 955, 959 (10th Cir. 1978). Moreover, the only reason the skiing public would pay for such transportation services is to enjoy the recreational use of the public lands—a use to which the public is entitled in any case. *See* 16 U.S.C. § 497 (special use permits must not be granted so as to "preclude the general public from full enjoyment of the natural, scenic, recreational and other aspects of the natural forests").

45 *Eastman Kodak Co.*, 273 U.S. at 375.

46 *See United States v. Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945).

ticket was a share of the proceeds unrelated to the merits of its own products. J.A. 28-30; Tr. 270-73. The jury properly could find that it was no hallmark of superior management for Ski Co. to refuse to deal with Highlands in any form of lift ticket exchange system, while other of its subsidiaries freely participated with independent entities in virtually identical arrangements, in markets where Ski Co. did not possess monopoly power. J.A. 29-30, 111-12.[47]

It was proper for the jury to infer that it was no exercise of business acumen when Ski Co. refused to sell lift tickets to Highlands on any basis, while Ski Co. willingly made sales at wholesale prices to tour operators and travel agents. J.A. 85; Tr. 828, 831-32. Despite the fact that such entities were Ski Co.'s competitors at the retail level,[48] J.A. 118, it did not target them with the

---

[47] In an apparent effort to taint such lift-ticket exchange systems, Ski Co. also mentions a lawsuit filed by the Colorado Attorney General resulting in the 1977 Consent Decree. Pet. Br. 3. The only relevance of that lawsuit here is that the Decree by its terms allowed the four-area ticket to continue. Ex. 26, Tr. 182. The fear of such actions by the Attorney General was urged upon the jury as a business justification for dropping out of the four-area ticket. J.A. 55. Yet, Ski Co.'s continued willingness to participate in a similar lift ticket exchange system in another part of Colorado, or even in Aspen on its "fixed" terms, made clear to the jury that Ski Co. was not chastened by this "threat." Finally, such a hypothetical threat could provide no justification for its refusals to sell tickets to Highlands or accept coupons from its customers.

[48] Remarkably, Ski Co. admits in its brief that it was and is willing to let tour operators and travel agents package its tickets with those of Highlands to make a four-area package. Pet. Br. 20-21, n. 21. Highlands is the only actual or potential retail competitor "forbidden" to create such a package. Ski Co.'s entire argument about what products "would have been provided" in response to "substantial effective demand" is astonishing. The evidence established that there was just such a demand for a multi-day, four-area ticket. J.A. 90-91, 94-96, 120; Tr. 982-83. Highlands sought to respond to that demand and was rebuffed and restrained by Ski Co. in all its attempts.

kind of discriminatory and exclusionary practices it leveled against Highlands. The jury's conclusion that such a refusal was anticompetitive, not the demonstration of business skill, was hardly unwarranted, nor does it reflect a novel view of antitrust law. *See Eastman Kodak Co.*, 273 U.S. 359.

The jury had good reason to conclude that Ski Co.'s mislabeling of Highlands as one of its own mountains in aerial photographs published nationwide and its willingness to deface Highlands' advertising materials were something more than shrewd competition on the merits. This campaign of misinformation adds further support to the jury verdict of unlawful monopolization.[49] By this dishonestly contrived barrier to attracting first-time skiers and a significant number of return visitors, Highlands was put at a great competitive disadvantage, J.A. 101-102, with a significant impact on competition.[50]

It also was proper for the jury to conclude that it was not competition on the merits for Ski Co. to refuse to honor Highlands Adventure Pack coupons, especially since the coupons were no more difficult to negotiate than the checks or credit cards that Ski Co. regularly accepted for lift tickets. J.A. 44-46, 100.

Moreover, there was no disadvantage to Ski Co. in accepting the coupons. The evidence showed that the Ad-

---

[49] "A monopolist's misrepresentations encouraging the purchase of his product can fit our general test for an exclusionary practice when the impact on rivals is significant; deception of buyers can impede the opportunities of rivals. Even apart from its impact on rivals, deception is undesirable because it can injure buyers and offend public morality." III P. Areeda & D. Turner, *supra* note 25, ¶ 738a at 278 (1978).

[50] *Cf. Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288, n. 41 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

venture Pack coupons provided Ski Co. the full undiscounted rate for each day of skiing at any of its three areas. J.A. 43-44, 46-47. Only after the filing of this action did Ski Co. choose to honor the traveler's checks and money orders that Highlands substituted for the rejected coupons—a fact that further reinforced the jury inference that Ski Co. unreasonably impeded competition.[51]

Ski Co.'s new claim that its conduct was legitimized *solely* by its "desire to compete," Pet. Br. 20, would be valid only if the willingness to sacrifice volume and profits in order to eliminate its remaining competitor is held, as a matter of law, to merely reflect such a benign motivation. The jury had evidence of a more sinister desire. No true competitor would have deliberately sacrificed the potential for increasing its own output that a four-area ticket represented. The Highlands' product would have attracted new skiers by its greater variety, and

---

[51] Ski Co. argues that it should not have to sell tickets to Highlands for inclusion in the Adventure Pack because by purchasing an Adventure Pack skiers would do at least half of their skiing at Highlands. Pet. Br. 30-31. However, such a situation would not entail any threat to a firm competing vigorously on the merits. There was no evidence that Highlands was, or could be, less responsive to market demand than independent tour operators. *Cf.* Pet. Br. 31, n. 33. If Ski Co.'s product were truly superior, market forces would doom the Adventure Pack. Its elimination would not have to be accomplished through a refusal to deal.

Moreover, if Ski Co. sold its tickets to Highlands at wholesale, as it did to tour operators and travel agents, it might have been economically feasible for Highlands to design its four-mountain package with greater flexibility. For example, as Ski Co. suggests, Pet. Br. 31, n. 33, packages could have been developed with two days, or even one day, at Highlands and the balance at Ski Co. mountains. Ski Co.'s complete refusal to pre-sell any tickets to Highlands on any basis forced Highlands to design the Adventure Pack with three days at Highlands to make it even marginally profitable.

would certainly have done more to assure that skiers frustrated with the three-area ticket would return to Aspen another year.[52] All of those skiers, in addition to the skiers satisfied with the three-area ticket, would have skied at Ski Co.'s mountains. A firm interested in competition, rather than exclusion, would have seized such an opportunity to compete and exercise real business acumen.

The jury properly could have found that it was more than shrewd price competition when Ski Co. manipulated its price structure in order to impede Highlands' competition. Ski Co. raised the daily ticket price substantially and at the same time deepened the discount on its three-area, six-day ticket. This use of monopoly power[53] was hardly the result of natural market forces[54]—it was twice the average rate of increase announced by Ski Co. during the previous eight years[55] and was not justified by the rate of inflation. Tr. 2140. Instead, the evidence showed that Ski Co.'s managers were aware of the characteristics of the Adventure Pack, Tr. 392-93, 623, and that the change in price effectively eliminated its profitability and continued existence. J.A. 132-33.

---

[52] Ski Co. relied on its market power and exclusion instead. From 1977, when its exclusionary conduct began, Ski Co.'s total skier visits and market share steadily grew, even though the total number of skiers coming to Aspen leveled off from the previous growth period, presumably because of overall consumer dissatisfaction. Ex. 97, J.A. 183.

[53] Monopoly power is, of course, "the power to control prices." *United States v. Grinnell Corp.*, 284 U.S. 563, 571 (1966).

[54] *Cf. California Computer Prods. Inc. v. IBM*, 613 F.2d 727, 739-42 (9th Cir. 1979).

[55] *See* Ex. 42, Tr. 182.

In sum, the jury had ample grounds for concluding that Ski Co. maintained or used its monopoly power through conduct that exceeded ordinary competition, and thereby unnecessarily excluded Highlands, constrained consumer choice and destroyed the competitive process in Aspen. As Ski Co. apparently concedes by arguing for new standards, under any reasonable application of this Court's traditional monopolization standards, the evidence was clearly sufficient.

III. Ski Co. Distorts The Law And The Facts In Its Attempt To Promote A Radical Rule Of License For Monopolists.

In its efforts to obtain a reversal, Ski Co. ignores the *Grinnell* standard, buries the essential facilities doctrine in a coffin of formalistic analysis, and argues that this Court must define some new standard of substantial exclusionary conduct. It then proposes a rule that at least in part goes far beyond what would be required under existing law. Even worse, it then applies that rule through conclusions and hypotheticals rather than facts found in the record. The result of this high handed treatment of the law and the facts is the creation of a barely disguised rule of *per se* lawfulness for a monopolist's conduct, essentially the same as the rule expressly advocated at the end of Ski Co.'s argument. Pet. Br. 48-50. When Ski Co.'s statements of the law are rectified to conform with existing law and applied to the facts in this case, the necessary result is affirmance. Only if the Court accepts Ski Co.'s self-serving characterizations of its conduct and its radical new *per se* approach, in either its covert or its overt exposition, can the verdict be reversed. Such a result would virtually eliminate the role of fact-sensitive analysis in future § 2 cases.

A. Ski Co. Attempts To Justify Its Conduct By Distorting The Evidence That Was Before The Jury.

To support its call for a depature from traditional monopolization standards, Ski Co. advances several "policy" arguments purportedly showing that those standards produced a wrong result here. For example, Ski Co. argues that the four-area ticket had a depressing effect on competition at the national level and created a "free rider" problem. Pet. Br. 23-27. The evidence for these arguments has been selectively pruned from the record and severely disfigured by Ski Co.

First, Ski Co. incorrectly asserts that, when a four-area ticket was offered, neither firm offered its own six-day ticket. Pet. Br. 24-25. The record is to the contrary.[56]

Next, Ski Co. fabricates support for its "free rider" arguments. Pet. Br. 25-27. In essence, Ski Co. maintains that, during the era of the four-area ticket, Highlands relied unfairly on the national advertising efforts of Ski Co. To support this argument, Ski Co. grossly mischarac-

---

[56] Through the 1971-72 ski season, Ski Co. offered its own six- or seven-day packages in competition with the four-area ticket. J.A. 154. By the same token, in the 1960's and early 1970's, Highlands offered a "wide variety of multi-day tickets of its own." Tr. 222. By the late 1960's, skiers expressed their strong preference for the four-area package, rather than a three-area package. J.A. 162. Thus, Ski Co.'s eventual decision not to offer its own three-area, six-day ticket was a normal response to demonstrated consumer preference and not a manifestation of diminished competition.

terizes the evidence by completely ignoring Highlands' promotional contributions through ARI.[57]

The so-called "limited" national advertising undertaken by Highlands of which Ski Co. is so critical was all in addition to Highlands' contribution to advertising through ARI. Ski Co.'s other criticism is that Highlands failed to continue its increased national advertising after elimination of the four-area ticket. This charge fails to acknowledge that the advertising cutback was part of the severe budget constraint Highlands was forced to undertake in response to the impact of Ski Co.'s exclusionary conduct on its revenues. J.A. 130-31.

The remainder of Ski Co.'s "free rider" argument is a theory never exposed to the facts. Highlands did

---

[57] Ski Co. seeks to prove its point by selectively setting forth the advertising and promotion line from Schedule E of Highlands' financial statements. Ex. S, Tr. 1292; Pet. Br. 25-26, n. 28. However, Ski Co. ignores Highlands' share of the marketing and administrative expenses of ARI which appear on those same schedules. By definition, because the division of marketing expenses was usage-based, the alleged "free rider" argument is devoid of theoritical validity. Factually, when the arithmetic correction is actually made, Ski Co.'s free rider argument completely evaporates:

	Highlands' Advertising & Promotion	Highlands' Share of ARI Marketing and Administrative Expense	Highlands' Total	
1972-73	$136,624	$ 33,240	$169,864	
1973-74 (ARI begun)	69,168	102,474	171,542)	
1974-75	80,638	173,626	254,264)	4-area
1975-76	100,769	194,954	295,723)	ticket
1976-77 (low-snow)	86,017	89,764	175,781)	offered
1977-78 (ARI sold)	125,847	—	125,847)	
1978-79	139,844	—	139,844	

not sit by "complacently" in the face of changing market conditions, Pet. Br. 39, but instead made extensive investments in its facilities, keeping pace with similar improvements by Ski Co.[58]

Ski Co. also contends that Highlands sought to continue free riding with the Adventure Pack. Pet. Br. 27. The basis for this contention is Ski Co.'s assertion that Highlands was appropriating Ski Co. good will by including skiing at Ski Co. mountains in the Adventure Pack and was doing so "only because Ski Co. provided and was known to provide, outstanding skiing." *Id.* Ski Co. offers no evidentiary support for this bold assertion. The evidence makes clear that the Adventure Pack included a mechanism for skiing at Ski Co. mountains in response to consumer demand for variety, J.A. 90-91, 97, 120; Tr. 982-83, 1029-30, not because of quality differences among individual mountains. J.A. 121. Ski Co.'s continuing efforts to justify its refusals to deal on the basis of Highlands' alleged inferior quality must be rejected by this Court as they were by the jury, which had ample evidence to conclude that all the Aspen areas were of comparable quality.[59] More importantly, Highlands, and not

---

[58] After the initial construction of three lifts in 1958, lifts were replaced or added in 1959, 1961, 1963, 1964, 1965, 1966, 1969, 1970 and 1975, for a total of twelve lifts by the time of trial. Tr. 429-34. In addition to these improvements, Highlands added "significantly" to its trail capacity in recent years, Tr. 202, including a major new trail, some 4,500 feet long, constructed in 1980, Tr. 449, which brought Highlands over 425 acres of skiing terrain. Tr. 281. From the 1973-74 ski season through the 1980-81 ski season (excluding the abnormal 1976-77 "low-snow" year), Highlands' capacity share of the Aspen market remained approximately the same. Ex. 97, J.A. 183.

[59] For example, the Forest Service snow ranger who inspected the four areas in Aspen weekly found the quality of Highlands' skiing experience among the "finest" in the country and comparable to Ski Co.'s. J.A. 60.

Ski Co., was the innovator bringing to Aspen the first free bus system, the only GLM ski school, the best children's ski instruction, the first NASTAR racing, and the only acrobatic skiing exhibitions. Such attractions contributed substantially to Aspen's overall popularity among destination skiers. J.A. 123, 172-73, 179-80.

B. Ski Co.'s Formalistic Analysis Of The Essential Facilities Cases Obscures The Evidence Here Of Substantial Anticompetitive Impact.

The present case was not tried under any "essential facilities" jury instruction; rather, the verdict is grounded solidly in the principles of *Grinnell*. However, because the Court of Appeals used an approach that analogized to the doctrine in affirming the judgment, Ski Co., drawing largely on hypothetical facts, attempts to turn the doctrine into a rigid and formalistic method of analysis and to persuade the Court that it does not apply here.

This Court has never announced a separate doctrine for antitrust cases under the name "essential facilities" or "bottleneck." Rather, each of the cases so labeled by commentators has rested upon its own particular facts and the application of traditional antitrust principles. However, as Ski Co. acknowledges, Pet. Br. 33, the doctrine had its origin in situations where some horizontal competitors had, through development of a new facility, come to control a service or delivery mechanism used by the competitors in that market. There is a direct analogy here.

The four-area ticket developed by the competitors in Aspen became the preferred choice of consumers for access to the variety of skiing experience available there.

It facilitated competition between the companies.[60] The evidence showed not only that a large number of skiers opted to purchase this "product," which gave the most variety, but also that many single-day skiers followed them. When Ski Co. refused to continue with the product the parties had together developed, used its monopoly power to provide a similar, though less complete product, and denied Highlands the ability to market a reasonable substitute by its refusals to deal and other exclusionary conduct, it precluded Highlands from reaching those consumers.[61] The damage inflicted on Highlands' ability to compete was severe.[62]

---

[60] The four-area ticket had none of the undesirable characteristics of a cartel: it did not restrict output; it created a new product; overall utilization of skiing increased; consumers received a discount; and the competitiors continued to market their own products. Because the parties obtained revenues and incurred promotional expenses from the arrangement on the basis of skier usage, the companies retained strong incentives to compete to attract skier visits and putative free rider problems were thereby eliminated. In analyzing an analogous arrangement in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-21 (1979), this Court correctly concluded that such an access mechanism was in reality a new product, comprising something more than its constituent elements, and that the arrangement was in fact procompetitive.

[61] Ski Co. argues that skiers still could ski Highlands because of the continued availability of daily lift tickets. Pet. Br. 20-21, 45-46. However, the evidence contrasts sharply with this hypothetical opportunity. Skiers demanded convenient access to a variety of mountains. Once the popularity of multi-area tickets was established, the daily life ticket had become an inferior distribution system, used mainly by less vigorous skiers tagging along after multi-area ticket holders.

[62] A facility is "essential" if denial of its use "inflicts a severe handicap" on competitors. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956

(Continued on next page)

Commentators have often recognized the potential for abuse in forcing a competitor out of an important distribution pattern.[63] As they foresee, Ski Co., with its market control, could bear the short run cost of limiting its own output that resulted from precluding the development of a full-variety exchange system. Highlands, on the other hand, loses such a war of attrition. The monopolist, by the use of its power alone, thus completely shuts down the competitive process, in spite of the fact that Highlands — an original participant, joint creator, and financing risk-taker in the ticket exchange system — had the strongest possible claim to a right of continued access to the market it helped create.[64]

The courts have also repeatedly confirmed that unreasonable exclusion from an important market access

---

(Continued from previous page)

(1978). Under Ski Co.'s self-serving definition of essentiality, had one of the railroads in *United States v. Terminal Railroad Assoc.*, 224 U.S. 383 (1912), later been excluded from the group and sued, it would have lost because the lack of access to the defendant's terminal did not "prevent" it from operating on its own tracks, or building its own terminal facilities.

63 *E.g.*, R. Bork, THE ANTITRUST PARADOX 158-59 (1978) (discussing predatory opportunity for majority of members of board of trade to force out or chasten more efficient rivals); and see P. Areeda, ANTITRUST ANALYSIS ¶¶ 383 and 385 (2d ed. 1974). The four-area ticket or exchange system is a "distribution pattern" because it permits the individual areas to sell to the substantial number of skiers who only buy multi-area tickets.

64 *See* L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST ¶ 48 at 132 (1977). Professor Sullivan finds sound support in this Court's decisions for the rule that a monopolist may not deny competitors reasonable and non-discriminatory access to an important distribution pattern.

mechanism can be an unlawful use of monopoly power.[65] Ski Co.'s narrow focus on formal market and business structures only obscures the important point: there is more than one way to use market power to deny access. No case has ever held that there was a doctrine applicable only to "unilateral vertical inter-market leveraging." Pet. Br. 35. In fact, the cases do not generally rely upon any finding of separate markets.[66] Thus, in *Terminal Railroad,* there was no formal finding of a "market" for railroad services and of a separate "market" for terminal, bridge and tunnel facilities. Nor in *Gamco* was there one "market" for produce wholesaling and a separate "market" for selling space. Rather, the "familiar evil," as articulated in *Lorain Journal,* was the use of market power to solidify a monopoly over "the mass dissemination of *all* news and advertising."[67]

Moreover, the essential facilities approach does apply in situations, as here, involving one product at different levels of a distributional system, without there being a

---

65 *See e.g. MCI Communications Corp. v. AT&T,* 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied,* 104 S. Ct. 234 (1983); *Hecht v. Pro-Football, Inc.,* 570 F.2d at 992; *Gamco, Inc. v. Providence Fruit & Produce Building, Inc.,* 194 F.2d 484, 487 (1st Cir.), *cert. denied,* 344 U.S. 817 (1952).

66 Ski Co. argues that the essential facilities doctrine *cannot* apply here because the jury did not find a separate "market" for multi-day, multi-mountain lift tickets. Pet. Br. 5, 39. Besides being legally unsupportable, this ignores the obvious. Because the case was submitted to the jury under the *Grinnell* standard proposed by Ski Co., the jury was not asked to identify such a market separately. It did find, however, that such a product was a discrete element within the relevant submarket. J.A. 188. Moreover, the evidence of separate demand for such a product was overwhelming.

67 *Lorain Journal Co. v. United States,* 342 U.S. 143, 153 (1951) (emphasis added).

formal definition of markets. For example *Otter Tail,* where, as Ski Co. acknowledges, Pet. Br. 34-35, n. 36, no markets were clearly defined, involved a refusal to sell electrical power at wholesale to a retail competitor. Nor have the "essential facilities" cases all been confined, as Petitioner argues, to *"producer"* goods to be incorporated into some end product, as opposed to a *consumer* good or service that the plaintiff wanted to re-sell to the public. Pet. Br. 36. Indeed in *Eastman Kodak Co. v. Southern Photo Materials Co.,* 273 U.S. 359 (1927), which Ski Co. identifies as an essential facilities case, Pet. Br. 43, the plaintiff wanted to purchase defendant's goods at wholesale and resell them to the public at retail in competition with the defendant.[68] In short, the so-called essential facilities cases, far from supporting Petitioner's revisionist antitrust jurisprudence, actually confirm the result below.

Given Ski Co.'s refusal to sell its tickets to Highlands, at wholesale or retail, Highlands could offer an effective substitute ticket only by developing another ski mountain in Aspen.[69] The actual record evidence of huge

---

[68] The identical situation is presented here. Highlands wanted to purchase Ski Co. life tickets at wholesale and resell them to consumers in a retail package. Ski Co.'s facile conclusion that "it had no actual or potential vertical relationship to Highlands," Pet. Br. 37, patently conflicts with the evidence. More importantly, this type of beguiling mischaracterization demonstrates the dangers of abandoning fact-sensitive inquiry and instead making labels outcome-determinative. Whether particular conduct has horizontal or vertical components and consequences is often not readily discernible, and the label may vary depending on the viewer's perspective. *Cf. United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972); *Com-Tel, Inc. v. DuKane Corp.,* 669 F.2d 404 (6th Cir. 1982).

[69] Ski Co.'s indifference to the evidence presented at trial concerning essentiality, Pet. Br. 38-39, is startling given the

(Continued on next page)

capital costs, tough regulation of entry by the Forest Service and local government, and limited lodging development in Aspen amply showed that such development was not practicable.[70]

Realistically viewed, the essential facilities cases simply teach that a monopolist may not arbitrarily refuse to compete. Because a monopolist has no absolute right to preserve the condition of ineffective competition, it may not arbitrarily deny access to a mechanism without which competition would be futile. Of course, neither the doctrine in the abstract, nor its application here, stands for the existence of an absolute "duty to cooperate." If, as required by *Grinnell,* Ski Co. had shown a plausible business justification for the exclusion of Highlands, such as inability to serve its own customers adequately, its conduct would have been defensible.[71] This it failed to do.

(Continued from previous page)

posture in which this appeal arises. For example, Ski Co. asks this Court to take judicial notice of the existence of single-mountain destination ski resorts (not all of which, incidentally, are single-mountain), Pet. Br. 38, while ignoring the evidence of what actually transpires in comparable multi-mountain resorts where Ski Co. also competes. Ski Co. claims that "[l]ike Ski Co., Highlands had the opportunity to develop multi-mountain capacity," Pet. Br. 39, while ignoring the obvious fact that Ski Co. did not "develop" several mountains, but rather *acquired* them—*i.e.* Ski Co. "integrated backward," *cf.* Pet. Br. 33, to gain control over multi-mountain capacity.

[70] *Cf. Poster Exchange, Inc. v. National Screen Service Corp.,* 431 F.2d 334, 339 (5th Cir. 1970), *cert. denied,* 401 U.S. 912 (1971). *See* A. D. Neale, THE ANTITRUST LAWS OF THE UNITED STATES 67 (2d ed. 1970).

[71] See Jury Instructions, J.A. 180-81; *Otter Tail Power Co. v. United States,* 410 U.S. at 378; *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.,* 194 F.2d at 488. Ski Co.'s assertion that it need not demonstrate any justification or competitive benefit betrays its thinly veiled argument for a rule of *per se*

(Continued on next page)

For this and other reasons, Ski Co.'s assertion that a requirement of reasonable access under these circumstances would be a "drastic departure" from antitrust principles, Pet. Br. 37, is unwarranted. As Ski Co. concedes, Highlands proved there was no business justification for Ski Co.'s refusal to deal, Pet. Br. 20, so Ski Co. can point to no demonstrable, as opposed to hypothetical, harm from such a requirement. More fundamentally, any complaint Ski Co. might have about such a requirement is pertinent only to the form of equitable relief, which is not at issue here. It has no bearing on whether the refusal was lawful or unlawful.

Finally, Ski Co.'s panegyric to "vision, planning, a willingness to take risks," Pet. Br. 39-40, cannot obscure the facts presented to the jury: Highlands had the vision to bring many new skier services to Aspen; Highlands did the planning that resulted in the four-area ticket; Highlands took the risk of investing in ARI and its advertising. However, the risk anticipated by Highlands was that consumer acceptance might not reward the effort. The risk that materialized was quite different—Ski Co. laid exclusive claim to that consumer acceptance and diverted the rewards to itself alone. No antitrust rule heretofore announced by this Court would protect the license of a monopolist to the extent Petitioner now requests.

C. Ski Co.'s New Test Should Not Be Adopted —Properly Stated And Applied To The Facts It Does Not Change The Result Reached By The Jury Below.

Ski Co. promotes a rule that would require a showing of "substantial exclusionary conduct" to prove unlawful

---

(Continued from previous page)

lawfulness for all horizontal refusals to deal. Under an appropriate rule of reason analysis, anticompetitive effects are unlawful if not counterbalanced by procompetitive benefits. *E.g.*, *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978).

monopolization.[72] Pet. Br. 18. To meet this requirement a plaintiff would have to prove that a defendant's conduct met one of four "tests." The new rule is proposed despite the fact that the *Grinnell* standard—whether a defendant is protecting his market position by competition on the merits or by unnecessarily exclusionary conduct—will identify exactly the same culpable conduct and anticompetitive impact as the proffered four-part test.[73] When these tests are actually applied to the evidence the exclusionary nature of Ski Co.'s conduct is obvious.

---

[72] Ski Co. nowhere explains the origin in existing law of the "substantiality" component of this test. If, by proposing a requirement of showing a "substantial restraint," Ski Co. intends to add some new element to traditional standards for gauging whether a particular type of conduct is unlawful, its attempt must be rejected. It invites a reviewing court to second-guess every jury verdict in a monopolization case and, without having heard all the evidence directly, to decide instead, from its own subjective analysis, whether a restraint is or is not "substantial." If, however, Ski Co. is suggesting that the amount of offensive conduct must be substantial or significant, the jury was explicitly instructed to that effect. Tr. 2314.

[73] Ski Co. also expressly proposes a *per se* rule of lawfulness for its unreasonably exclusionary conduct. Its rationale for such an abrupt and unprecedented departure from fact-sensitive antitrust analysis is a tautological ode to trader sovereignty and the spectre of "judicial supervision of dealings." Pet. Br. 48-50. However, *per se* rules are appropriate only when the Court is convinced from experience with a market situation that it knows "enough of the economic and business stuff out of which these arrangements emerge to be certain." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Presumably, a *per se* rule of legality would be "appropriate" only with respect to conduct that is "manifestly" procompetitive. *Cf. Continental T.V., Inc. v. GTE/Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977). It would be impossible to reach such a conclusion about Ski Co.'s conduct here without totally ignoring the record.

1. Ski Co. Substantially Restrained The Opportunities Of Its Competitor.

A monopolist goes beyond acceptable conduct when it preserves its market position by preventing another business from competing with it on the merits. It thereby excludes competition and short-circuits the competitive process. Thus, a monopolist is held to have engaged in unlawful conduct when it pursues a course of action which prevents another business from competing *regardless* of its relative efficiency, the attraction of its products, or the skill of its management—precisely the kind of behavior addressed in and condemned by *Grinnell*. Because of its monopoly power, the monopolist's refusal to deal excludes competitors from the process of competition.

Affirmance under Ski Co.'s test requires only that there be evidence from which the jury could find that Ski Co. imosed any substantial amount of restraint, unrelated to competition on the merits, on Highlands' ability to compete. The preceding review of the impact of Ski Co.'s preclusion of Highlands' competition for a significant number of destination skiers leaves no doubt that there was more than enough evidence.[74]

2. Ski Co. Substantially Restrained Consumer Freedom Of Choice.

Ski Co. did not simply offer what it hoped was a superior product—it removed from the market, and precluded Highlands from selling, a product skiers had demonstrated they wanted. Ski Co. in fact acknowledges that consumers were frustrated. Pet. Br. 45-46. Where a monopolist frustrates consumer choice, *Grinnell* requires

---

[74] See pp. 10-11, 29-33, *supra*.

that there be an acceptable explanation for its conduct.[75] If such an explanation is not forthcoming, then a jury can fairly find that the monopolist has unreasonably interfered with the attainment of an essential goal of the competitive process—consumer freedom of choice.[76] Thus, *Grinnell* also encompasses the second Ski Co. test.

Again, under that second test, the question is whether there was evidence from which the jury could find that Ski Co. imposed any substantial amount of restraint on consumer freedom of choice. Evidence of the fustrated skiers practically locked into Ski Co.'s three-area ticket, unable to get or conveniently use the preferred four-area ticket, and misled by deceptive advertising provided the answer to this question.[77] Even under the second Ski Co. test, it has unlawfully monopolized.

3. Ski Co.'s Conduct Was Predatory.

Ski Co.'s third test is a severely limiting definition of predatory conduct. In contrast, a formulation more faithful to this Court's decisions defines predatory conduct as "a firm's deliberate aggression against one or more rivals through the employment of business practices that would not be considered profit-maximizing except for the expectation either that (1) rivals will be driven from the market . . . or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator

---

[75] "Consumer interests require, particularly, that acts of dominant and leading firms in concentrated markets be scrutinized and possibly restrained." E. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140, 1168 n. 109 (1981) (citations omitted).

[76] *See* P. Areeda, *Introduction to Antitrust Economics*, 52 Antitrust L.J. 523, 534 (1983), in which the author identifies as one of the goals of the antitrust laws the preservation of "multiple choices for producers and consumers free of the arbitrary dictates of monopolies."

[77] See pp. 11-12, 28-33, *supra*.

finds inconvenient or threatening.'"[78] The definition need not, as Ski Co. suggests, Pet. Br. 19, depend on absolute destruction. The *Grinnell* rule readily covers such conduct, which is not only exclusionary but deliberately so.

In the record below, one need not look far for evidence of such predatory conduct. For example, in 1977 Ski Co. conditioned Highlands' continued participation in the ticket exchange system on its acceptance of an arbitrarily low percentage of revenues unrelated to the competitive merits of the products. Ski Co. did not invoke the spirit of Adam Smith, Pet. Br. 22, or the ethos of corporate culture, Pet. Br. 16, to justify this proposal. Instead, it acted on its naked power to limit Highlands' revenues without regard to the relative efficiency or competitive attractiveness of either firm. Its position was a simple ultimatum: If you capitulate to our demands, we will not pursue our effort to drive you out of the market for destination skiers. In that first year of its exclusionary campaign, when Highlands yielded, Ski Co. dropped its threat to eliminate the four-area ticket exchange system. Its style was predatory from the beginning.[79]

4. Ski Co.'s Conduct Was Uniquely Monopolistic.

By definition, actions advantageous uniquely to a monopolist must be something other than "ordinary business practices typical of those used in a competitive

---

78 R. Bork, *supra* note 26, at 144.

79 See R. Bork, *supra* note 26, at 157: "Proof of specific intent to engage in predation may be in the form of statements made by the officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or evidence that the conduct was not related to any apparent efficiency."

market."[80] Market actions that are uniquely monopolistic are those that a firm without market control would find substantially less effective or even counterproductive.[81] Nor are they examples of superior product or business acumen.

Such conduct confirms by its very existence that competition is ineffective. Application of the *Grinnell* rule prevents this abuse of monopoly power and protects the process of competition. Thus, "the *Grinnell* rule recognizes that maintaining or extending market control by the exercise of that power is sufficient to complete a violation of § 2."[82]

Again, the record below amply reveals uniquely monopolistic behavior. Ski Co. could successfully refuse to allow any form of four-area ticket in Aspen only because consumers did not have the option of switching to any other supplier to get the product they desired. No producer without market power, such as the ski areas in Summit County, would have set out to destroy this means of access to a substantial segment of the market. Ski Co. could successfully refuse to honor Adventure Pack coupons or refuse to sell its own tickets to Highlands at their full retail price only because it could sacrifice the short-run profit on the sale to the expectation of ultimately freeing itself from all competition. Ski Co., unlike a competitive firm, derived a demonstrable benefit from this limitation on consumer choice: by its own survey, a substantial portion of destination skiers spent at least one day on Ski Co.'s mountains which they would have preferred

---

80 *Telex Corp. v. IBM*, 510 F.2d 894, 925-26 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

81 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 291.

82 *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 274.

to spend at Highlands. Thus, Ski Co.'s profits and relative utilization were increased in spite of the consumer's preference for an alternative mountain. As is predictable where competition is foreclosed by a monopolist, the consumer is the true loser.

CONCLUSION

Petitioner may not challenge the sufficiency of the evidence on monopolization, because it did not raise the issue below. Even if this Court reaches Ski Co.'s arguments, ample evidence thoroughly supports the general jury verdict. This case presents no basis for discarding the existing law of monopolization and adopting radical theory. Overbearing and unnecessarily exclusionary conduct by an admitted monopolist was properly condemned under conventional § 2 standards after full trial to a jury. This Court can readily conclude that the jury rightfully found that Ski Co. had succeeded in insulating itself from competition by conduct that went beyond the lawful boundaries of vigorous competition on the merits.

For the foregoing reasons, the jury verdict should be left undisturbed and the judgment below, affirmed.

Respectfully submitted,

TUCKER K. TRAUTMAN
(Counsel of Record)
JOHN H. EVANS
OWEN C. ROUSE
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
(303) 623-2700
Attorneys for Respondent

Of Counsel:
JOHN H. SHENEFIELD
MILBANK, TWEED, HADLEY & MCCLOY
Washington, D.C.

Office - Supreme Court, U.S.
FILED
MAR 20 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASPEN SKIING COMPANY,

Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONER

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
MARK S. LEVINSTEIN
MANLEY W. ROBERTS

WILLIAMS & CONNOLLY
839 17th Street, N.W.
(202) 331-5000
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

DAVID G. PALMER
WILLIAM W. MAYWHORT
Denver, Colorado

March 19, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

25 pp

TABLE OF CONTENTS

	Page
I. HIGHLANDS' IRRELEVANT NEW ISSUES.	1
A. Aspen Skiing Co.'s Acquisitions.	1
B. Highlands' "Innovations".	3
C. Ski Co.'s Other Area Joint Ticket Participations.	4
D. Ski Co.'s Allegedly Excessive Revenue Sharing Demands.	4
E. Ski Co.'s Alleged Advertising Improprieties.	5
F. The Comparison of Ski Co.'s Own Lift Tickets With the Joint Ticket.	8
G. Ski Co.'s Alleged Discrimination Against Highlands.	9
II. FACTUAL CORRECTIONS.	9
A. As to the Nature of Ski Co.'s Refusal to Cooperate with Highlands.	9
B. As to the Availability of a Marketplace Remedy.	11
C. As to Highlands' Free Ride.	14
D. As to Ski Co.'s Refund Policy.	15
III. THE LEGAL ASSERTIONS WARRANTING REPLY.	16
A. The Duty to Cooperate Issue Was Raised at Trial.	16
B. The Invalidity of Court-Ordered Joint Marketing Applies to The Damage Remedy as Well as to The Injunction.	17

TABLE OF CONTENTS continued

Page

C. Highlands' Proposed Test to Distinguish Competitive From Exclusionary Conduct Is Inapplicable Here. 18

D. The Requirement of Substantial Exclusionary Conduct As An Element of Monopolization Is Not Impermissibly Unclear. 19

E. Ski Co. Has Not Taken The Limited View Of The Essential Facilities Doctrine That Highlands Attributes To It. 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES: Page

Associated Radio Service Co. v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980) 7

Berkey Photo, Inc. v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) 5, 7, 17

Copperweld Corp. v. *Independence Tube Corp.*, 104 S. Ct. 2731 (1984) 8

Heath v. *Aspen Skiing Co.*, 325 F. Supp. 223 (D. Colo. 1971) 13

Hunt v. *Crumboch*, 325 U.S. 821 (1945) 8

Jefferson Parish Hospital Dist. v. *Hyde*, 104 S. Ct. 1551 (1984) 8

McNeilab, Inc. v. *American Home Products Corp.*, 501 F. Supp. 517 (S.D. N.Y. 1980) 6

Penthouse Int'l Ltd. v. *Playboy Enterprises, Inc.*, 663 F.2d 371 (2d Cir. 1981) 6

Skil Corp. v. *Rockwell Int'l Corp.*, 375 F. Supp. 777 (N.D. Ill. 1974) 6

Telex Corp. v. *IBM*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) 17

Trace X Chemical, Inc. v. *Canadian Industries, Ltd.*, 1984-2 Trade Cas. (CCH) ¶ 66,089 (8th Cir. 1984) . 5

Toro Corp. v. *Textron, Inc.*, 499 F. Supp. 241 (D. Del. 1980) 6

United States v. *Columbia Steel Co.*, 334 U.S. 495 (1948) 2

United States v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973) 17

United States v. *Terminal R.R. Ass'n*, 224 U.S. 383 (1912) 19

TABLE OF AUTHORITIES continued

Page

STATUTES:

Fed. Trade Commission Act, 15 U.S.C. § 45 (1982) ... 6-7

Lanham Act, 15 U.S.C. § 1125(a) (1982) 6

Sherman Act, 15 U.S.C. §§ 1, 2 (1982) ..... passim

OTHER AUTHORITY:

P. Areeda & D. Turner, ANTITRUST LAW (1978) 7, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-510

ASPEN SKIING COMPANY,
Petitioner,

v.

ASPEN HIGHLANDS SKIING CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Respondent, Aspen Highlands Skiing Corporation ("Highlands"), in its brief, has raised several issues that are irrelevant, has made a number of factual assertions that need correction, and has made several legal assertions that warrant response.

I. HIGHLANDS' IRRELEVANT NEW ISSUES.

A. Aspen Skiing Co.'s Acquisitions.

Highlands refers to Aspen Skiing Co.'s ("Ski Co.'s") development of multi-mountain capacity as having occurred through two acquisitions—of the Buttermilk operation in 1963-64 (Tr. 158) and of the Snowmass operation in 1967 (Ex. 36(c), Tr. 180).

Resp. B. 4-5, 26-27.[1] In both cases, Ski Co. itself developed the destination skier facilities, and thus did not merely acquire established operations. Moreover, the acquisitions approximately twenty years ago, and ten years before the events in issue, as defined by Highlands (Tr. 206), are irrelevant to the present antitrust claim.

First, acquisitions are not in general unlawful, *e.g.*, *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948); and here it was not shown, or even contended, that Ski Co.'s acquisitions were unlawful.

Second, at the times of the acquisitions, the acquired operations were not viable independent entities competing against, or having the potential to compete against, Ski Co. At the time of the acquisition of Buttermilk, Ski Co. had only Aspen Mountain, which was (and is) for expert skiers. Tr. 1155, 1175-77, 2062-63. Buttermilk was operated for beginners by the head of Ski Co.'s ski school, Tr. 204-05; and so it did not compete with Aspen Mountain, Tr. 1546-47. Moreover, in the words of Highlands' president, Buttermilk "wasn't doing too well" at the time, Tr. 157; and it had never functioned independently, Tr. 158, 1544-45. Snowmass, the other acquired operation, had, at its own request, been developed and operated by Ski Co. from the very beginning. Tr. 158, 1475-76. Thus, the Snowmass operation, too, had never had the capacity to be an independent competitor.

---

[1] "Resp. B" stands for Brief for Respondent. "Pet. B." stands for Brief for Petitioner. "J.A." stands for the Joint Appendix filed in this Court. "Tr." stands for the transcript of proceedings in the trial court. "Pet. App." stands for the appendix to the Petition for Certiorari.

Third, the transformation of the Aspen submarket from a market for local skiers to a destination market, attracting skiers from all over North America and elsewhere, did not occur until after Ski Co.'s two acquisitions. Tr. 156-57, 1176, 1503-04. Thus, contrary to Highlands' unsupported assertion, Resp. B. 42-43 n.69, Ski Co. did not acquire *any* destination skiing operations, but took the risks and made the investments to develop three destination skiing mountains on its own.[2]

B. Highlands' "Innovations".

Highlands refers to its "innovations" and improvements. Resp. B. 3-4, 37-38, 44. It does not deny, however, that it never made the one innovation and improvement that it now contends is necessary for success—namely, development of multi-mountain capacity. Nor does it deny that, during its 23 years in the business, it had full opportunity to develop such capacity, but did not have the foresight or tolerance for risk to do so.

---

[2] Highlands mentions a comment by a director of Ski Co., in connection with a suggested purchase of Highlands, that "what we want to control is skiing in Aspen." Resp. B. 4, citing J.A. 23-24. The conversation took place "in the early 60's," *id.*, and therefore has no bearing on Ski Co.'s actions or intent fifteen to twenty years later. Moreover, the price offered for Highlands—book value less depreciation (Tr. 160)—hardly reflected an expectation of monopoly profits.

Highlands also refers to Ski Co.'s subsequent acquisition policy, Resp. B. 26, but that policy related to acquisitions outside the Aspen submarket. There is no evidence that, between the early 1960's and the present, Ski Co. made any attempt to purchase Highlands or any other actual or potential skiing operation in the Aspen area or in any other area where it had a substantial market position.

C. Ski Co.'s Other Area Joint Ticket Participations.

Highlands notes that Ski Co. participated in joint ticket arrangements in two skiing areas other than Aspen. Resp. B. 1 n.1, 8 & n.9, 9, 25, 30. The inference to be drawn is that Ski Co. found it advantageous to participate in such arrangements elsewhere, but not in Aspen. A firm that engages in a joint venture in one or two markets does not thereby incur a legal duty to engage in a joint venture in a third market, where economic circumstances are different. The free enterprise system leaves such matters to voluntary choice, rather than to rules of law or decisions by courts or juries. The record does not show definitively why Ski Co. participated in joint ventures elsewhere but not in Aspen. Highlands speculates that the decisive factor was presence of monopoly power in Aspen but not elsewhere. A much more likely explanation than monopoly power (as reflected in submarket share) is that Ski Co.'s Aspen facilities were able to compete on their own for destination skiers, and that its facilities elsewhere were not. *See* Tr. 400-01.

D. Ski Co.'s Allegedly Excessive Revenue Sharing Demands.

Highlands complains that during negotiations over the division of joint ticket revenues for the 1977-78 and 1978-79 seasons, Ski Co. demanded percentage shares that Highlands considered too high. Resp. B. 22, 29-30.[3] Outside a true bottleneck situation, there

[3] Highlands agreed to the percentage division proposed by Ski Co. for 1977-78, but rejected the division proposed for 1978-79. In fact, the 15% Highlands share agreed to in advance for 1977-78 exceeded Highlands' actual 1976-77 share, which was 13.43%. Ex. 5, Tr. 170. Highlands' share of joint ticket usage had been declining since 1974-75. *Id.*

is nothing improper in the owner of a valuable asset negotiating for as large a share of available revenues as can be obtained for allowing another party to benefit from the use of the asset. The author of a best-selling book may demand as high a price as may be gotten when selling the movie rights; a firm holding a valuable trade secret may seek the maximum possible price for products made by use of it. Contrary to Highlands' assertion at Resp. B. 48, seeking a large share of joint venture revenues is in no way predatory. *Trace X Chemical, Inc.* v. *Canadian Industries, Ltd.*, 1984-2 Trade Cas. (CCH) ¶ 66,089, at 66,076 (8th Cir. 1984). The earning of large revenues promotes entry and competition. *See* Pet. B. 46; *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 294 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

E. Ski Co.'s Alleged Advertising Improprieties.

Highlands complains about isolated elements in Ski Co.'s advertising of its own three mountains, principally on the extraordinary ground that Ski Co. failed to spend its own money to advertise Highlands. Resp. B. 9-10, 22, 31. Of course, Ski Co. had no duty to do so; and its failure to do so was not an antitrust violation. The record contains no evidence that Ski Co.'s advertising was false or deceptive,[4] that it disparaged

[4] Highlands cites three isolated aspects of Ski Co.'s advertising as allegedly deceptive. Resp. B. 9-10.

Highlands' exhibit of the airport poster (Ex. 60, Tr. 182) shows that the words "only" and "all," which had been appropriate when the poster referred to all four skiing mountains, were deleted when it was changed to refer to Ski Co.'s three mountains.

Highlands in any way, or that it misled consumers or induced them not to patronize Highlands.[5]

Even if, contrary to the record, some advertising by Ski Co. had been found to be false under standards derived from the common law,[6] or § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (1982),[7] or § 5 of the

---

The relevant text then read: "Three Mountains. On One Lift Ticket." The revised poster was in no way deceptive.

Highlands complains that Exhibits 66 and 67 (Tr. 182) "equat[e] the word 'Aspen' with Ski Co." Resp. B. 9. These brochures certainly associate Ski Co.'s facilities with the town of Aspen, but there is no statement or suggestion that Ski Co.'s facilities are the only ones in the area. The brochures simply do not mention Highlands, and there was no obligation that they mention it. Nor is it deceptive for a firm to associate itself with the place where it conducts its business.

In Ex. 103, J.A. 184, it does not appear that the names "Aspen Mountain," "Buttermilk," or "Snowmass" are intended to refer to specific mountains shown in the photograph, or that readers of the advertisement would care whether they did or not. The fact that the mountain on which Highlands operates appears in a photograph used in the advertisement does not impose on Ski Co. an obligation to advertise Highlands.

[5] Although Highlands asserts that newcomers to Aspen were misled and return visitors were confused by Ski Co.'s advertising, Resp. B. 10, it cites no evidence because there is none, that the advertising had such effects.

[6] See, e.g., Penthouse Int'l Ltd. v. Playboy Enterprises, Inc., 663 F.2d 371, 391 (2nd Cir. 1981) (confusion of reasonable readers).

[7] Toro Corp. v. Textron, Inc., 499 F. Supp. 241, 251, 253-54 (D. Del. 1980) (proof of, *inter alia*, actual consumer reliance); McNielab, Inc. v. American Home Products Corp., 501 F. Supp. 517, 524-25 (S.D.N.Y. 1980) ("evidence usually in the form of market research or consumer surveys showing how the statements are perceived by those who are exposed to them"); Skil Corp. v. Rockwell Int'l Corp., 375 F. Supp. 777, 782-83 (N.D. Ill. 1974).

Federal Trade Commission Act, 15 U.S.C. § 45 (1982) (which does not authorize an award of damages), there would still be no antitrust violation. On the facts of this case, the influence of any allegedly false or deceptive advertising would have been *de minimis*, and certainly not material support for a damage award of $2.5 million before trebling. *See* generally 3 P. Areeda & D. Turner, Antitrust Law [hereinafter cited as "Areeda & Turner"] ¶ 738a at 278-79 (1978);[8] *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra,* 603 F.2d at 288 n.41; *see also Associated Radio Service Co.* v. *Page Airways, Inc.,* 624 F.2d 1342, 1354-56 (5th Cir. 1980), *cert. denied,* 450 U.S. 1030 (1981). Simi-

---

[8] Highlands quotes the opening two sentences of the discussion of misrepresentations in Areeda & Turner, ¶ 738a. Resp. B. 31 n.49. Highlands omits their conclusion: "There is no redeeming virtue in deception, but there is a social cost in litigation over it. To determine the impropriety of a representation implicates the usual tort issues with respect to non-disclosure (When is there a duty to speak?), the distinction between 'fact' and 'opinion,' the knowledge or due care of the speaker, the actual degree of reliance by those allegedly deceived and the 'reasonableness' of any such reliance. [Citation.] That particular buyers might have been deceived is not itself of § 2 concern. . . . The key problem here is the difficulty of assessing the connection between any improper representations and the speaker's monopoly power. Because the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances—and because the prevalence of arguably improper utterance is so great—the courts would be wise to regard misrepresentations as presumptively *de minimis* for § 2 purposes. The presumption could be overcome by cumulative proof that the representations were clearly false, clearly material, clearly likely to induce reasonable reliance, made to buyers without knowledge of the subject matter, continued for prolonged periods, and not readily susceptible of neutralization or other offset by rivals." The record in this case does not come close to satisfying *any* of the requirements for overcoming the presumption.

larly, as the Court noted in *Jefferson Parish Hospital District No. 2* v. *Hyde,* 104 S. Ct. 1551, 1560 (1984), even *per se* rules are applicable only where there is a "substantial potential for impact on competition," not where such impact would be *de minimis.* Moreover, ["the Sherman] Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945). *Cf. Copperweld Corp.* v. *Independence Tube Corp.,* 104 S. Ct. 2731, 2745 (1984), explaining that eliminating the intra-enterprise conspiracy doctrine "will . . . not cripple antitrust enforcement," but "will simply eliminate treble damages from private state tort suits masquerading as antitrust actions."

F. The Comparison of Ski Co.'s Own Lift Tickets With the Joint Ticket.

Highlands argues that Ski Co.'s market share was not the result of a superior product. Resp. B. 27-28. Highlands compares Ski Co.'s lift tickets with the joint ticket, which included access to Ski Co.'s facilities. The relevant comparison, however, is between Ski Co.'s facilities (and the lift tickets for access to them) and Highlands' facilities (and the lift tickets for access to them). The relative attractiveness of the parties' facilities to skiers is demonstrated by Highlands' unwillingness to compete straight out against Ski Co. and its demand for association with Ski Co.

G. Ski Co.'s Alleged Discrimination Against Highlands.

Highlands asserts that Ski Co. sold tickets to tour operators but not to it. Resp. B. 7, 22, 30-31. Highlands and tour operators are not comparable. Other than Highlands, no firm that operated skiing facilities (and thus competed with Ski Co. in such operation) sought to buy tickets from Ski Co. Highlands did not seek to perform the economic function of a tour operator: combining lift tickets with lodging and transportation, and marketing the package to individual skiers throughout North America. Had Ski Co. continued to participate in issuing joint tickets or sold its own tickets to Highlands, Highlands would have re-sold the tickets to tour operators, and would not itself have become one.[9]

II. FACTUAL CORRECTIONS.

A. As to the Nature of Ski Co.'s Refusal to Cooperate with Highlands.

Highlands asserts: "Ski Co. repeatedly refused . . . to deal with [Highlands'] customers." Resp. B. 22;

---

[9] Highlands asserts that it "wanted to purchase Ski Co. lift tickets at wholesale and resell them to consumers in a retail package." Resp. B. 42 n.68. There is no evidence for that assertion. Highlands also refers to Ski Co.'s refusal "to sell its own tickets to Highlands at their *full retail price.*" Resp. B. 49 (emphasis added). Highlands would not have been entitled to any wholesale discount from Ski Co. because it had no intention, or capacity, to perform any wholesale or other substantial economic function with respect to Ski Co.'s tickets. Ski Co. certainly did not need to have its tickets sold through Highlands' ticket windows, nor was Highlands interested in selling them in that manner.

Ski Co.'s rejection of Highlands' Adventure Pack coupons, though part of a strategy of competition rather than cooperation with Highlands, was not discriminatory toward Highlands. Ski Co. did not accept any coupons. Tr. 1659-60.

see also *id.* 23. That statement is unsupported by the record, and is incorrect. Ski Co. was willing to sell tickets to every customer of Highlands who wanted to buy them. *See* Pet. B. 29-30. Highlands argues that Ski Co.'s refusal to sell tickets to Highlands and its refusal to honor Highlands' Adventure Pack coupons involved a "willingness to sacrifice volume and profits in order to eliminate its remaining competitor . . . ." Resp. B. 32. That argument, too, is factually incorrect. Even in the short-term period covered by the evidence in this case, Ski Co.'s number of annual skier visits generally *increased* (J.A. 183): there is no evidence of any sacrifice of volume or profits in any time period.

Highlands asserts: "Thus, a seller such as Ski Co. can utilize a refusal to deal as a device to restrict output or to discipline customers and competitors. 'Moreover, he has a weapon with which to extend his control over the market.'" Resp. B. 23 (citation omitted). There has never been a suggestion, and there is no evidence, that Ski Co. refused to cooperate with Highlands in order to restrict output or to discipline customers or any competitor, or that its conduct had any such effect. There is no evidence that Ski Co. intended that its "output" decrease or that it did decrease. There is no evidence that Ski Co. intended to "discipline," *i.e.*, to punish or penalize in order to induce a change in conduct, or that it did "discipline" anyone. There is no evidence that Ski Co. sought to gain patronage by use of any "weapon" other than the attractiveness of its skiing facilities and its own marketing skills. Finally, it is striking that Highlands complains of not being able to "turn to another source of supply" of lift tickets, Resp. B. 23: Highlands was

a *producer* of skiing services and a *seller* of its own lift tickets.

Highlands contends that, as one of the initiators of multi-day, multi-mountain tickets, it was a "financing risk-taker." Resp. B. 40. On the contrary, the shift from selling single-mountain tickets each day to selling multi-day, multi-mountain tickets at or before the beginning of the skier's vacation (see Resp. B. 2-3) involved no risk whatever, but rather created a profitable float, from which Highlands benefited. Ski Co.'s withdrawal from the joint ticket did not deprive Highlands of the reward for any risk it had taken, or the benefit of any business practice it had invented.[10]

B. As to the Availability of a Marketplace Remedy.

Highlands suggests that the marketplace was dissatisfied with Ski Co.'s withdrawal from the joint ticket because there was substantial effective demand for the joint ticket. Resp. B. 30 n.48. "Effective demand," as an economic concept is not, however, a matter of subjective preferences, but rather of market behavior. Effective market demand for a product no longer offered will be reflected in (1) reduced demand for products offered as substitutes, and (2) substantial effective efforts by the market to bring about restoration of the product formerly offered. The record here contains no evidence of such effective demand for the joint ticket—by tour operators, or by skiers. As Highlands acknowledges, "skiers could simply shun an area that denied them [what] they wanted." Resp. B. 25. There is no evidence from market behavior that skiers

[10] The idea of a joint ticket was brought to Aspen by Friedl Pfeiffer, who headed the Ski Co. ski school and was involved with Buttermilk. J.A. 21.

shunned Aspen or Ski Co. due to the absence of the joint ticket. Highlands' real complaint is that skiers found Ski Co.'s three-area ticket an adequate substitute for the joint ticket. *See also* Pet. B 20-21. In sum, the market did not express a need for any remedy.

Highlands argues that combinations of daily tickets with or without limited multi-day tickets (*e.g.*, for three days or some other number less than six) were an inadequate marketplace remedy because daily tickets were "used mainly by less vigorous skiers tagging along after multi-area ticket holders." Resp. B. 39 n.61. There is no evidence to support that speculation: the record contains no quantitative analysis of the usage of daily tickets.

Moreover, Highlands' own evidence was that a daily ticket to its facilities could provide a full variety of skiing. Tr. 151, 155-56. If Highlands' problem was that Ski Co. had more skiing terrain of each type than Highlands did and thereby could satisfy a skier's demand for varied terrain within a particular skill level, then Highlands is complaining about a capacity that Ski Co. had achieved but Highlands had not. A firm's refusal to share its capacity with a horizontal competitor is not an antitrust violation.

Even apart from Highlands' claim that its facilities were as good and as varied as Ski Co.'s, Ski Co.'s refusal to continue the joint ticket did not "den[y] Highlands the ability to market a reasonable substitute," Resp. B. 39, and did not prevent or restrain Highlands from offering its own tickets in competition on the merits, *id.* 46. Highlands had full opportunity to offer the market its own tickets as a remedy for whatever deficiencies the market might perceive in Ski Co.'s performance.

Highlands argues that "[t]he competitive consequences of a monopolist's refusal to deal can not be remedied through marketplace discipline. Rejected customers cannot simply turn to another source of supply." Resp. B. 23. That argument is correct in some applications, *e.g.*, an electric power utility. It is incorrect, however, as applied to the facts of this case. The jury found that Ski Co. had monopoly power (not that it had a monopoly), and that it had such power in a submarket (which was part of a larger market). J.A. 187-88.[11] Even in a two-firm market, inadequate performance by one firm, even one with monopoly power, can be disciplined by superior competitive performance by the other firm. If Ski Co.'s performance failed to satisfy skiers, they could turn to Highlands. Moreover, the discipline is strengthened where, as here, the monopoly power is only in a submarket patronized predominantly by transients. During any period of time longer than a single skiing vacation, customers dissatisfied with Ski Co. could turn to any of numerous other skiing mountains with which it competes in the North American market found by the jury. *See also Heath* v. *Aspen Skiing Co.*, 325 F. Supp. 223, 231-32 (D. Colo. 1971).

---

[11] Highlands takes pains to argue that the Aspen submarket was not "purely competitive." Resp. B. 22-25. Of course not: no two-firm market is perfectly competitive, and the jury found that Ski Co. had monopoly power in that submarket. Highlands, too, had market power: it did not face a horizontal demand curve. The mere existence of an oligopolistic market or monopoly power is not a violation of § 2. Pet. B. 7 & n.6. Moreover, Highlands has not shown that Ski Co.'s conduct was different from the conduct that would be pursued by a firm with much smaller market share but the same facilities Ski Co. had.

C. As to Highlands' Free Ride.

In response to the free rider argument made at Pet. B. 25-26, Highlands contends that certain arrangements between itself and Ski Co. for joint promotional activities were structured to avoid free rider problems. Resp. B. 5-6 n.5. That is true. But the structure of those activities did not eliminate or reduce the real and quite different free rider problem we described.

Highlands contends that the figures on its advertising and promotional expenses presented in Pet. B. 26-27 n.28 fail to reflect Highlands' contributions to the promotional efforts of Aspen Reservations, Inc. ("ARI"), which was supported jointly by Highlands and Ski Co. Resp. B. 36 n.57. Highlands' comment reinforces the point made in n.28, the relevance of the figures cited there, and the irrelevance of Highlands' adjusted figures. The point is that during the latter years of the joint ticket (1973-74 to 1977-78), Highlands' *own independent* promotional expenditures *for its own facilities* were reduced. The fact that Highlands shifted its advertising expenditures from independent competitive efforts to cooperative efforts through ARI (presumably to promote Aspen in general and the joint ticket) further supports our argument that the joint ticket substantially depressed competition *between the firms.*

We argued that Highlands' Adventure Pack depended on a free ride on Ski Co.'s good will. Pet. B. 27-28. Highlands takes that as an argument that Ski Co.'s facilities were superior to Highlands'. Resp. B. 37. Although Highlands' expert acknowledged the superiority of Ski Co.'s facilities, *e.g.,* Tr. 1153-55, 1342, our argument does not depend on any finding of superiority, or on any comparison between Ski Co.'s facilities and Highlands'. It depends merely on the indisputable fact that Ski Co.'s facilities had *some* good will, *some* attraction to skiers, from which Highlands sought to benefit.

D. As to Ski Co.'s Refund Policy.

Highlands asserts that "most skiers" were unaware of Ski Co.'s refund policy. Resp. B. 11. There is no evidence for that assertion—from surveys of skiers or otherwise. Highlands did find two witnesses to testify that they, individually, were unaware of the policy. But they do not speak for the hundreds of thousands of skiers whose state of knowledge is not reflected in the record. Highlands notes that Ski Co. "would explain its refund policy only if asked by the skier." Resp. B. 11 n.13. Highlands does not contend that this practice was different from the custom of businesses generally, or from the custom of skiing operations, or from its own practice. Indeed, Highlands does not describe its own refund policy at all, or mention whether it informed skiers of it. In fact, even after adjustments for differences in numbers of skiers served, Highlands made far fewer refunds than did Ski Co. J.A. 160 (in 1977-78, Highlands refunded $800 of joint ticket purchases; Ski Co. refunded $110,000).[12]

---

[12] Highlands cites J.A. 123-24 for the proposition that "Ski Co. often sent skiers across town to the tour operator who sold them the ticket to secure a proper fund." Resp. B. 12 n.14. In fact, the testimony was that skiers "were told . . . that they may be able

III. THE LEGAL ASSERTIONS WARRANTING REPLY.

A. The Duty to Cooperate Issue Was Raised at Trial.

In opposing Ski Co.'s contention that the evidence is not sufficient to support the verdict, Highlands argues that the issue of non-existence of a duty to cooperate was not preserved in the trial court. Resp. B. 14-18. This point was fully briefed to and considered by the court of appeals, which decided it correctly. *See* Pet. App. 13a-15a. The insufficiency of the evidence was raised in Ski Co.'s motion for directed verdict at the close of Highlands' case in chief. Citing relevant authorities, counsel for Ski Co. argued that there cannot be a duty to cooperate. Tr. 1452 ("Now, we also think, Judge, that there cannot be a requirement of cooperation between competitors . . ."); J.A. 134. In the context, this argument could be understood only as asserting (1) that Highlands' evidence was sufficient to go to the jury only if it is the law under § 2 that competitors may be required to cooperate, (2) that that is not the law, and (3) that, therefore, Ski Co. is entitled to a directed verdict. Counsel also argued, with respect to conduct alleged to have violated both § 1 and § 2 (*see* Tr. 2251), that there was no adverse effect on competition, and thus, by necessary implication, that the evidence was insufficient to support the § 2 claim. Tr. 1455. Counsel

to receive a larger refund from [the tour operator] because . . . [Ski Co.] was deducting a service charge which was comparable to the commission that [Ski Co. had] paid [the tour operator]." J.A. 123. Thus, Ski Co. was not sending skiers across town, but, rather, was willing to give refunds at its own offices but also told skiers they might be able to get a larger refund from the tour operator. Ski Co. was willing to make refunds on the spot or by mail, so that a skier seeking a refund did not have to lose any skiing time. *See* J.A. 159.

renewed these arguments at the close of all the evidence. J.A. 180. Counsel argued that Highlands had "proved our case," and, by necessary implication, that it had failed to present sufficient evidence to prove its own case. Highlands' contention that counsel's argument about duty to compete related not to the issue of conduct but rather to the issues of market definition and monopoly power, Resp. B. 16-17 n.18, makes no sense. The cases cited by counsel—*Telex Corp.* v. *IBM*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975), and *Berkey Photo, Inc.* v. *Eastman Kodak Co., supra*—are jointly noteworthy for their discussions of the conduct element.[13]

B. The Invalidity of Court-Ordered Joint Marketing Applies to The Damage Remedy as Well as to The Injunction.

Highlands suggests that Ski Co.'s objections to the "court-ordered scheme of mandatory joint marketing"

[13] Highlands' citation, Resp. B. 18 n.21, of United States v. Falstaff Brewing Corp., 410 U.S. 526, 575 (1973) (Rehnquist, J., dissenting), is inapt because the opinion deals with the transformation of a plaintiff's case from one theory at trial to another introduced for the first time on appeal. Justice Rehnquist's concern was that the *plaintiff* was being given an opportunity to try its case a second time with a new theory, for which no evidence had been introduced at the first trial. 410 U.S. at 573-74, 575. No such situation is present in the instant case, and no possible unfairness to Highlands is involved. Here, the question is whether, after the plaintiff had fully presented its case in chief, the *defendant* adequately presented its legal position that, as a matter of law, it had no duty to cooperate and therefore was entitled to a directed verdict. We submit that that position was, in express terms, presented to the trial court, as the court of appeals found. Moreover, Highlands certainly cannot complain that it had more evidence of non-cooperation that it did not offer because it was not clearly apprised of Ski Co.'s legal position.

apply only to the injunction issued below, and not to the award of treble damages. Resp. B. 1 & n.1, 44. In fact, the objections apply to both. If treble damages can be awarded for a mere refusal to enter into a horizontal joint marketing scheme, then (a) the law would mandate participation in such a scheme, and (b) an injunction to enforce the law would generally be an available remedy, as it was here. The expiration of the injunction in this case will not remove the precedential effect of the decision below. Highlands represents that it will not seek an extension of the injunction when it expires. Resp. B. 1 n.1. Presumably, Highlands is relying on the threat of treble damage action to induce Ski Co. to maintain into the indefinite future the joint ticket, on which Highlands claims its prosperity depends.

C. Highlands' Proposed Test to Distinguish Competitive From Exclusionary Conduct Is Inapplicable Here.

Highlands proposes that conduct be deemed exclusionary "if . . . the exercise of monopoly power has the effect in the short run of disadvantaging competitive firms, perhaps even driving them out of the market, in an effort to gain larger profits in the long run." Resp. B. 20. The test is inapplicable here because Ski Co.'s withdrawal from the joint ticket and its refusal to cooperate with Highlands were not exercises of monopoly power, but could be engaged in successfully by any firm with sufficiently attractive facilities. Moreover, Ski Co.'s conduct did not "disadvantage" Highlands. Highlands was put in the position of having to compete on the merits in all aspects of its business, but that is not a "disadvantage" from which the antitrust laws provide protection.

D. The Requirement of Substantial Exclusionary Conduct As An Element of Monopolization Is Not Impermissibly Unclear.

We argue that monopolization in violation of § 2 involves substantial exclusionary conduct. Pet. B. 18-19. Highlands professes confusion as to the source of the term "substantial" in this context. Resp. B. 45 n.72. The term is used in furtherance of the maxim, *de minimis non curat lex,* and is reflected in Areeda & Turner's limitation of exclusionary conduct to conduct that appears "capable of making a *significant* contribution to creating or maintaining monopoly power." Areeda & Turner, ¶ 626c at 79 (emphasis added), *quoted in* Pet. B. 18-19, Resp. B. 19-20 n.25. *See also* pp. 7-8, *supra.*

E. Ski Co. Has Not Taken The Limited View Of The Essential Facilities Doctrine That Highlands Attributes To It.

Contrary to Highlands' assertion at Resp. B. 42, we do not argue that the essential facilities doctrine is limited to producer goods. We referred to "an input (producer *or wholesale* good or service). . . ." Pet. B. 36 (emphasis added).

Contrary to Highlands' argument at Resp. B. 39-40 n.62, moreover, under our view of the essential facilities doctrine a railroad excluded from access to the terminal involved in *United States* v. *Terminal R.R. Ass'n,* 224 U.S. 383 (1912), would have been entitled to recover. Access to the terminal was an essential input for operation of a railroad in the St. Louis area and was controlled by a vertically integrated group of competitors. By contrast, access to Ski Co.'s facilities was not an essential input for operation of Highlands' facilities in Aspen, and those facilities were not controlled by a vertically integrated firm.

CONCLUSION

For the foregoing reasons, together with those set forth in Pet. B.,[14] the Court should reverse the judgment below.

Respectfully submitted,

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
(Counsel of Record)
RICHARD M. COOPER
MARK S. LEVINSTEIN
MANLEY W. ROBERTS

WILLIAMS & CONNOLLY
839 17th Street, N.W.
Washington, D.C. 20006
(202) 331-5000

Attorneys for Petitioner

Of Counsel:

DAVID G. PALMER
WILLIAM W. MAYWHORT

Denver, Colorado

DATED: March 19, 1985

---

[14] A typographical error appears in Pet. B. 44, fifth line from the bottom: the reference to "J.A. 146" should read "J.A. 46."